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No.

In the Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, PETITIONERS

v.

CBS CORPORATION, CBS BROADCASTING, INC., CBS TELEVISION STATIONS, INC., CBS STATIONS GROUP OF TEXAS L.P., AND KUTV HOLDINGS, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

GREGORY G. GARRE
Solicitor General
Counsel of Record
GREGORY G. KATSAS
Assistant Attorney General
MALCOLM L. STEWART
Deputy Solicitor General
ERIC D. MILLER
Assistant to the Solicitor General
THOMAS M. BONDY
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

MATTHEW B. BERRY
General Counsel
JOSEPH R. PALMORE
Deputy General Counsel
JACOB M. LEWIS
Associate General Counsel
Federal Communications Commission
Washington, D.C. 20554

QUESTION PRESENTED

Whether the court of appeals erred in holding that the Federal Communications Commission acted arbitrarily and capriciously under the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*, in determining that the most widely viewed broadcast of public nudity in television history fell within the federal prohibitions on broadcast indecency.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Federal Communications Commission and the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-82a) is reported at 535 F.3d 167. The orders of the Federal Communications Commission (App., *infra*, 83a-122a, 123a-183a) are reported at 21 F.C.C.R. 6653 and 21 F.C.C.R. 2760, respectively.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 184a-185a) was entered on July 21, 2008. On October 9, 2008, Justice Souter extended the time within which to file a petition for a writ of certiorari to and including November 18, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

Pertinent provisions are set out in the appendix to this petition. App., *infra*, 186a-189a.

STATEMENT

1. a. Federal law has long forbidden the broadcast of "obscene, indecent, or profane language by means of radio communication." 18 U.S.C. 1464. In 1992, Congress supplemented that prohibition by directing the Federal Communications Commission (FCC or Commission) to "promulgate regulations to prohibit the broadcasting of indecent programming" during certain times of the day. Public Telecommunications Act of 1992, Pub. L. No. 102-356, § 16(a), 106 Stat. 954. See *Action for Children's Television* v. *FCC*, 58 F.3d 654, 669-670 (D.C. Cir. 1995) (en banc), cert. denied, 516 U.S. 1043 (1996). The FCC's rules currently prohibit licensees of radio and television stations from broadcasting "any material which is indecent" between the hours of "6 a.m. and 10 p.m." 47 C.F.R. 73.3999(b). The Commission does not regulate indecent broadcasts outside that time period. The FCC has authority to enforce the broadcast-indecency prohibition by, *inter alia*, imposing civil forfeitures, see 47 U.S.C. 503(b)(1)(B) and (D), or taking violations into account during license-renewal proceedings,

see 47 U.S.C. 307 (2000 & Supp. V 2005); 47 U.S.C. 309(k).

b. In *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978), this Court upheld the constitutionality of the FCC's authority to regulate indecent broadcasting. At issue in *Pacifica* was the midday radio broadcast of George Carlin's monologue "Filthy Words." Responding to a listener complaint, the Commission determined that the broadcast violated Section 1464. *Id.* at 731-732. This Court held that the Commission's enforcement action was consistent with the First Amendment. *Id.* at 749-750.

c. For several years after *Pacifica*, the Commission enforced the indecency prohibition only against "material that closely resembled the George Carlin monologue," that is, material that "involved the repeated use, for shock value, of words similar or identical to those" used by Carlin. *In re Infinity Broad. Corp.*, 3 F.C.C.R. 930, 930 ¶ 4 (1987) (*Infinity Reconsideration Order*). In 1987, however, the Commission determined that such a "highly restricted enforcement standard * * * was unduly narrow as a matter of law" because it "focus[ed] exclusively on specific words rather than the generic definition of indecency." *Id.* at 930 ¶ 5. Accordingly, the Commission concluded that, in enforcing Section 1464, it would apply the generic indecency test articulated in *Pacifica*, that is, whether the material "describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs, when there is a reasonable risk that children may be in the audience." *Id.* at 930 ¶¶ 2, 5 (quoting *In re Citizen's Complaint Against Pacifica Found. Station WBAI (FM)*, 56 F.C.C.2d 94, 98 ¶ 11 (1975)).

In making that change, the Commission recognized that "the question of whether material is patently offensive requires careful consideration of context." *Infinity Reconsideration Order*, 3 F.C.C.R. at 932 ¶ 16. Despite its renewed emphasis on context, however, the Commission stated that "[i]f a complaint focuses solely on the use of expletives * * * deliberate and repetitive use * * * is a requisite to a finding of indecency." *In re Pacifica Found., Inc.*, 2 F.C.C.R. 2698, 2699 ¶ 13 (1987). In contrast, the Commission explained, when offensive material "goes beyond the use of expletives" and involves "the description or depiction of sexual or excretory functions," "repetition of specific words or phrases is not necessarily an element critical to a determination of indecency." *Ibid.* In *Action for Children's Television* v. *FCC*, 852 F.2d 1332 (1988) (R.B. Ginsburg, J.), the District of Columbia Circuit held that the Commission had provided a reasoned explanation for its change in enforcement policy, and it rejected a constitutional challenge to the Commission's new enforcement standards for indecency.

d. In 2001, the Commission issued a policy statement to provide further guidance concerning the indecency standard. *In re Industry Guidance on the Comm'n's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broad. Indecency*, 16 F.C.C.R. 7999 (*Industry Guidance*). In that statement, the Commission explained that it applies a two-part test to determine whether a broadcast is indecent. First, the material at issue "must fall within the subject matter scope of [the] indecency definition—that is, the material must describe or depict sexual or excretory organs or activities." *Id.* at 8002 ¶ 7. Second, "the broadcast must be *patently offensive* as measured by contemporary com-

munity standards for the broadcast medium." *Id.* at 8002 ¶ 8.

The policy statement reiterated that whether a broadcast is "patently offensive" turns on "the *full context*" in which the material is broadcast and is therefore "highly fact-specific." *Industry Guidance*, 16 F.C.C.R. at 8002-8003 ¶ 9. The Commission set out three "principal factors" that it considered "significant" in evaluating patent offensiveness: "(1) the explicitness or graphic nature of the description or depiction of sexual or excretory organs or activities; (2) whether the material dwells on or repeats at length descriptions of sexual or excretory organs or activities; [and] (3) whether the material appears to pander or is used to titillate, or whether the material appears to have been presented for its shock value." *Id.* at 8003 ¶ 10 (emphases omitted).

The Commission stressed that "[e]ach indecency case presents its own particular mix of these, and possibly other, factors, which must be balanced to ultimately determine whether the material is patently offensive and therefore indecent." *Industry Guidance*, 16 F.C.C.R. at 8003 ¶ 10. For example, with respect to the second factor, the Commission noted that "[r]epetition of and persistent focus on sexual or excretory material" may "exacerbate the potential offensiveness of broadcasts," but "even relatively fleeting references may be found indecent where other factors contribute to a finding of patent offensiveness." *Id.* at 8008-8009 ¶¶ 17, 19.

e. In 2004, the Commission changed its policy concerning isolated expletives. The previous year, NBC had presented a live broadcast of the Golden Globe Awards, at which the rock singer Bono used the F-Word while receiving an award. The FCC determined that the broadcast was indecent. *In re Complaints Against Var-*

ious Broad. Licensees Regarding Their Airing of the "Golden Globe Awards" Program, 19 F.C.C.R. 4975 (2004) (*Golden Globe Awards Order*). It disavowed, as "no longer good law," "prior Commission and staff action" that had "indicated that isolated or fleeting broadcasts of the 'F-Word' * * * are not indecent or would not be acted upon," and it stated "that the mere fact that specific words or phrases are not sustained or repeated does not mandate a finding that material that is otherwise patently offensive to the broadcast medium is not indecent." *Id.* at 4980 ¶ 12.

Two years later, the FCC applied the new policy articulated in the *Golden Globes Awards Order* when it concluded that two broadcasts of the Billboard Music Awards that included isolated uses of expletives were indecent. *In re Complaints Regarding Various Television Broads. Between Feb. 2, 2002 and Mar. 8, 2005*, 21 F.C.C.R. 13,299 (2006). The Commission reaffirmed that the fleeting nature of an utterance does not by itself preclude a finding of indecency, reasoning that "categorically requiring repeated use of expletives in order to find material indecent" would be "inconsistent with our general approach to indecency enforcement" and its "stress[] [on] the critical nature of context." *Id.* at 13,308 ¶ 23. The Second Circuit granted petitions for review and vacated that order, concluding that the Commission had violated the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, because it had failed to provide an adequate explanation for its change in policy. *Fox Television Stations, Inc.* v. *FCC*, 489 F.3d 444 (2007), cert. granted, 128 S. Ct. 1647 (No. 07-582) (2008) (argued Nov. 4, 2008).

2. This case arises from the February 1, 2004, broadcast of the Super Bowl XXXVIII halftime show. The

2004 Super Bowl was the most-watched Super Bowl up to that time and was the highest-rated program of the 2003-2004 television season (among children of all ages as well as adults). App., *infra*, 84a, 113a. The halftime show was produced by MTV Networks, a subsidiary of Viacom, Inc., and was carried live by stations owned by CBS Broadcasting (another Viacom subsidiary), as well as by independently owned stations affiliated with the CBS television network. *Id.* at 124a-125a & n. 2. For the finale of the show, at approximately 8:30 p.m. eastern standard time, Janet Jackson performed a duet with Justin Timberlake entitled "Rock Your Body." *Id.* at 124a, 127a. During the song, Timberlake repeatedly grabbed Jackson and rubbed against her in a sexually suggestive manner. *Id.* at 127a. At the close of the performance, while singing, "gonna have you naked by the end of this song," Timberlake pulled off the right portion of Jackson's bustier, exposing her breast to the television audience. *Ibid.*

Soon after the incident, CBS issued a statement that expressed its "deep[] regret," emphasized that "[t]he moment did not conform to CBS broadcast standards," and "apologize[d] to anyone who was offended." C.A. App. 101. Viacom's president and chief operating officer subsequently told a congressional committee that "everyone at CBS and everyone at MTV was shocked and appalled * * * by what transpired," and that the material "went far beyond what is acceptable standards for our broadcast network." *The Broadcast Decency Act of 2004: Hearings on H.R. 3717 Before the Subcomm. on Telecomm. and the Internet of the House Comm. on Energy and Commerce*, 108th Cong., 2d Sess. 37 (2004) (statement of Mel Karmazin).

3. a. The Commission received "an unprecedented number" of complaints about the broadcast. *In re Complaints Against Various Television Licensees Concerning Their Feb. 1, 2004 Broad. of the XXXVIII Super Bowl Halftime Show*, 19 F.C.C.R. 19,230, 19,231 ¶ 2 (2004). In response to those complaints, the Commission issued a letter of inquiry asking CBS to provide a tape of the broadcast and information about its production. *Id.* at 19,231 ¶ 3. After considering CBS's submissions, the Commission issued a notice of apparent liability, concluding that CBS had apparently violated the federal restrictions on broadcast indecency, and proposing a total forfeiture of $550,000 against the television stations that the network owned and operated. *Id.* at 19,240 ¶ 24.

b. After receiving CBS's opposition to the notice of apparent liability, the Commission reaffirmed its tentative conclusions in a forfeiture order. App., *infra*, 123a-183a. The Commission first found that the material fell within the subject-matter scope of its indecency definition because the broadcast of an "exposed female breast" depicted a sexual organ. *Id.* at 133a. The Commission then determined, applying its three-factor contextual analysis, that the material was patently offensive as measured by contemporary community standards for the broadcast medium. *Id.* at 133a-139a.

First, the Commission concluded that the material was graphic and explicit. App., *infra*, 134a-136a. In reaching that conclusion, the Commission relied on *In re Young Broadcasting of San Francisco, Inc.*, 19 F.C.C.R. 1751 (2004) (*Young Broadcasting*), released shortly before the Super Bowl broadcast, which had found an apparent indecency violation when a television station briefly aired images of a performer's penis. Stating that

"a scene showing nude sexual organs is graphic and explicit if the nudity is readily discernible," the Commission found that the image of Jackson's breast was "clear and recognizable to the average viewer." App., *infra*, 135a. The Commission further found that the explicitness of the image was reinforced by the presence of Jackson and Timberlake (the show's headline performers) in the center of the screen and by the fact that Timberlake's dramatic ripping off of Jackson's bustier drew the viewer's attention to what was exposed. *Ibid.*

Second, the Commission concluded that the broadcast of Jackson's exposed breast was shocking and pandering. It noted that the exposure occurred just as Timberlake sang "gonna have you naked by the end of this song" and after "repeated references to sexual activities" and sexually suggestive choreography. App., *infra*, 137a-138a. The display was particularly "shocking to the viewing audience," the Commission stated, because it occurred as a result of a man tearing off a woman's clothing "during a prime time broadcast of a sporting event that was marketed as family entertainment and contained no warning that it would include nudity." *Id.* at 138a.

Third, the Commission acknowledged that the image of Jackson's breast was displayed only briefly. It concluded, however, that the "brevity" of the exposure alone did not compel the conclusion that the broadcast was not indecent and, instead, was outweighed by its explicitness and its shocking nature. App., *infra*, 136a-137a, 139a.

c. CBS filed a petition for reconsideration. On reconsideration, the Commission reaffirmed its conclusion that the broadcast was indecent and that a forfeiture was appropriate. App., *infra*, 83a-122a.

4. The court of appeals vacated and remanded. App., *infra*, 1a-82a.

a. The court of appeals held that the Commission's order was invalid under the APA on the ground that it constituted an unexplained departure from a policy "that isolated or fleeting material did not fall within the scope of actionable indecency." App., *infra*, 9a. The court rejected the Commission's argument that its 2001 policy statement had made clear to broadcasters that "even relatively fleeting references may be found indecent where other factors contribute to a finding of patent offensiveness." *Industry Guidance*, 16 F.C.C.R. at 8009 ¶ 19. According to the court, "the 'relatively fleeting references' identified by that sentence are distinguishable from the truly 'fleeting' broadcast material the FCC had included in its fleeting material policy." App., *infra*, 19a. The court also rejected, as against "the balance of the evidence," the Commission's contention that the former exception "extended only to fleeting words and not to fleeting images." *Id.* at 37a. Reviewing the Commission's precedents, the court held that the Commission's decisions "treated broadcasted images and words interchangeably," so it "follow[ed] that the Commission's exception for fleeting material * * * likewise treated images and words alike." *Ibid.*

According to the court of appeals, the *Golden Globe Awards Order*, in which the Commission had disavowed any indecency exception for "isolated or fleeting broadcasts of the 'F-word,'" 19 F.C.C.R. at 4980 ¶ 12, represented the "first time the Commission distinguished between formats of broadcast material or singled out any one category of material for special treatment under its fleeting material policy," App., *infra*, 22a-23a. The court construed the *Golden Globe Awards Order* to modify the

FCC's prior policies only slightly, "by excising only one category of fleeting material—fleeting *expletives*," thus leaving in effect "a residual policy on other categories of fleeting material—including all broadcast content other than expletives." *Id.* at 23a (emphasis added).

The court of appeals distinguished the Second Circuit's decision in *Fox*, which involved a challenge to the application of the Commission's indecency standard to the broadcast of isolated expletives. In *Fox*, the court stated, "the FCC provided an explanation for changing its policy on fleeting expletives," and the "critical question splitting the [Second Circuit] was whether that explanation was adequate" under the APA. Pet. App. 27a. In this case, however, the court of appeals believed that "the FCC has not offered *any* explanation—reasoned or otherwise—for changing its policy on fleeting images." *Ibid.* (emphasis added). Rather, the court explained, "the FCC asserts it never had a policy of excluding fleeting images from the scope of actionable indecency, and therefore no policy change occurred when it determined that the Halftime Show's fleeting image of [an exposed female] breast was actionably indecent." *Ibid.* The court of appeals, however, rejected that contention and concluded that the FCC had changed its enforcement policy as to fleeting images.

The court of appeals also dismissed the significance of the notice of apparent liability in *Young Broadcasting*. The court recognized that in *Young Broadcasting*, the Commission had found a television licensee apparently liable for permitting the broadcast of "less than one second" of nudity. App., *infra*, 32a. But it disagreed with the Commission's view that the decision demonstrated the agency's "preexisting * * * policy of treating fleeting images differently from fleeting

words." *Id.* at 33a. Instead, the court concluded that the case was "best understood as the Commission's initial effort to abandon its restrained enforcement policy on fleeting material." *Id.* at 34a.

The court of appeals also questioned the Commission's finding that CBS had the requisite mental state to be liable for Jackson and Timberlake's performance during the halftime show. App., *infra*, 39a. The court stated that liability could not be premised on a respondeat superior theory because "Jackson and Timberlake were independent contractors rather than employees of CBS." *Id.* at 57a. It also rejected the contention that CBS broadcast licensees could be held vicariously liable for violating a non-delegable duty not to broadcast indecent material. *Id.* at 57a-67a. Instead, the court determined that "[r]ecklessness would appear to suffice as the appropriate scienter threshold for the broadcast indecency regime," *id.* at 74a, and it suggested that a "broadcaster's failure to use available preventative technology, such as a delay mechanism, when airing live programming may, depending on the circumstances, constitute recklessness," *id.* at 76a-77a. The court stated that it could not determine, on the existing record, whether CBS had acted recklessly in failing to employ a video delay technology in this case. *Id.* at 79a.

The court of appeals accordingly vacated and remanded the Commission's decision, specifying that "[f]urther action by the Commission would be declaratory in nature," because "the agency may not retroactively penalize CBS." App., *infra*, 80a.

b. Judge Rendell dissented in part. App., *infra*, 81a-82a. She agreed with the majority's conclusion that Commission had acted arbitrarily and capriciously, but she disagreed "with the majority's conclusion that there

is a need to remand this case," noting that the agency could instead explain its change in policy "in the next case or issue a declaratory ruling." *Id.* at 82a. She also disagreed with the majority's decision to discuss, "in dicta," the level of scienter required to establish a violation of the Commission's broadcast indecency rules. *Id.* at 81a.

REASONS FOR GRANTING THE PETITION

The court of appeals erred in overturning the Commission's determination that CBS's broadcast of the 2004 Super Bowl halftime show violated federal indecency prohibitions. In holding that the Commission's order in this case reflected an unexplained departure from the FCC's prior enforcement regime, the court relied on a purported "fleeting images" exemption to indecency enforcement that in fact has never existed. In the orders at issue here, the Commission explained that, while it formerly required *expletives* to be repeated before it would treat them as actionably indecent (which accounts for the change in policy at issue in *Fox*), it had never exempted the broadcast of *images*—however brief— from federal indecency restrictions. In the decision below, the court of appeals erroneously construed the Commission's policies on broadcast indecency and, in the process, contravened settled principles governing the review of administrative action and interpretations.

Rather than deferring to the Commission's reasonable interpretation of its own precedent, the court of appeals conducted what was in substance a de novo review of Commission indecency decisions over the past three decades. And even though none of the prior administrative decisions that the court surveyed had exempted a brief image from indecency enforcement, the

court concluded that the FCC's prior exemption for fleeting material had applied to isolated words and images interchangeably. By vacating the Commission's order for failure to explain its divergence from a policy that never existed, the judgment below departs from settled administrative-law principles and leaves the Commission powerless to enforce the sanctions it levied against CBS for the most widely-viewed broadcast of public nudity in television history during a time of day when millions of children were watching.

Both this case and *FCC* v. *Fox Television Stations, Inc*, No. 07-582 (argued Nov. 4, 2008), concern APA challenges to the FCC's enforcement of broadcast-indecency prohibitions that were upheld by this Court in *Pacifica*. Both cases involve the contours of the Commission's indecency policies over the past three decades—specifically as applied to offensive material (expletives in *Fox*, images in this case) that is isolated or fleeting. And both cases involve the deference due to the Commission's actions and interpretations under the APA. In light of the substantial overlap between the two cases, the petition for a writ of certiorari should be held pending the disposition of *Fox*. At that time, the Court can determine whether to grant certiorari, vacate the decision below, and remand for further consideration in light of its decision in *Fox*, or instead to grant certiorari and proceed with plenary review.

A. The Decision Below Is Inconsistent With Settled Principles of Deference To An Agency's Reasonable Interpretation Of Its Own Precedent

It is well settled that an agency's interpretation of its own regulations is "of controlling weight unless it is plainly erroneous or inconsistent with the regulation."

Bowles v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945). Likewise, "[a]n agency's interpretation of its own precedent is entitled to deference" and must be upheld if "reasonable." *Boca Airport, Inc.* v. *FAA*, 389 F.3d 185, 190 (D.C. Cir. 2004) (brackets in original) (quoting *Cassell* v. *FCC*, 154 F.3d 478, 483 (D.C. Cir. 1998)). The Commission's interpretation of its indecency rules and policies is well supported by its prior guidance and decisions, as well as by the common-sense distinction between words and images. The court of appeals erred in setting that interpretation aside under the APA.

1. More than two decades ago, the Commission held that "[w]hile speech that is indecent must involve more than an isolated use of an offensive word, * * * repetitive use of specific words or phrases is not an absolute requirement for a finding of indecency." *In re Pacifica Found., Inc.*, 2 F.C.C.R. at 2699 ¶ 13. Instead, the Commission stated, "deliberate and repetitive use in a patently offensive manner is a requisite to a finding of indecency" only where "a complaint focuses solely on the use of expletives." *Ibid.* By contrast, "[w]hen a complaint goes beyond the use of expletives, * * * repetition of specific words or phrases is not necessarily an element critical to a determination of indecency." *Ibid.* Accordingly, "speech involving the description or depiction of sexual or excretory functions must be examined in context to determine whether it is patently offensive." *Ibid.*

Those statements made clear that, under the Commission's then-existing policy, repetition was essential to a finding of indecency only where expletives were concerned. By contrast, depictions or verbal descriptions of sexual or excretory functions did not have to be re-

peated to be found indecent. Because an image is not an expletive—and because an image necessarily "depicts" —the Commission's 1987 decision put broadcasters on notice that the exception to the broadcast indecency regime for isolated expletives had no application to isolated indecent images.

The Commission reiterated the distinction between expletives and other types of indecent material in its 2001 policy statement. The FCC first set forth its three-factor test for assessing the patent offensiveness of allegedly indecent programming, noting that one of the factors is "whether the material dwells on or repeats at length descriptions of sexual or excretory organs or activities." *Industry Guidance*, 16 F.C.C.R. at 8003 ¶ 10 (emphasis omitted). The Commission then explained that the "passing or fleeting" nature of "sexual or excretory references" would tend to weigh against a finding of indecency," *id.* at 8008 ¶ 17, while emphasizing that "even relatively fleeting references may be found indecent where other factors contribute to a finding of patent offensiveness," *id.* at 8009 ¶ 19. The examples the Commission gave of non-indecent brief matter involved the passing use of expletives; the examples of indecent brief matter involved descriptions of sexual activities. *Id.* at 8008-8010 ¶¶ 17-19.[1]

Any remaining doubt about the FCC's policy should have been removed by the order in *Young Broadcasting*, which was issued just days before the 2004 Super Bowl

[1] The court of appeals sought to distinguish the examples of fleeting indecent material discussed in the Commission's 2001 policy statement on the ground that they were not "truly 'fleeting.'" App., *infra*, 19a. Each of the examples highlighted by the Commission, however, involved statements of only one or two sentences. See *Industry Guidance*, 16 F.C.C.R. 8009-8010 ¶ 19.

took place. In that case, the Commission proposed to impose a forfeiture on a broadcast licensee for televising "less than a second" of nudity. 19 F.C.C.R. at 1755 ¶ 12. As here, the Commission explained that "although the actual exposure * * * was fleeting," *ibid.*, "the weight of the pandering, titillating and shocking manner of presentation, coupled with the graphic and explicit nature of the * * * nudity," made the broadcast indecent. *Id.* at 1757 ¶ 14.

The court of appeals characterized *Young Broadcasting* "as the Commission's initial effort to abandon its restrained enforcement policy on fleeting material." App., *infra*, 34a. But that simply begged the relevant question by assuming that the Commission's exception for fleeting expletives extended to images in the first place. The court did not explain why the Commission would have decided to "abandon" its policy *sub silentio* in order to impose a forfeiture in a case involving one local broadcaster. And the Commission did not do so. Rather, the FCC in *Young Broadcasting* refrained from discussing the categorical exemption for fleeting nudity because no such exemption existed.

2. To support its view that the Commission previously recognized an "exception for fleeting material" that "treated images and words alike," App., *infra*, 37a, the court of appeals observed that the agency had "consistently applied identical standards and engaged in identical analyses" regardless of whether indecency complaints "were based on words or images," *id.* at 28a-29a. The court found the Commission's reliance on *Young Broadcasting* "unavailing" because, in the court's view, the decision "makes no distinction, express or implied, between words and images in reaching its indecency determination." *Id.* at 33a. The court likewise

stated that the Commission had not treated the nudity in a broadcast of the film *Schindler's List* "differently —factually or legally—from a complaint for indecency based on a spoken utterance." *Id.* at 29a (citing *In re WPBN/WTOM License Subsidiary, Inc.*, 15 F.C.C.R. 1838 (2000)).

The court of appeals' analysis is flawed. The court's principal error lay in its focus on the Commission's broad analytical framework for evaluating broadcast indecency, which applies equally to words and images, rather than on the agency's specific statements regarding fleeting material, which have expressly distinguished between expletives and other material. See *In re Pacifica Found., Inc.*, 2 F.C.C.R. at 2699 ¶ 13. Whether material is dwelled upon has always been a relevant factor under the Commission's generally applicable three-part test for patent offensiveness, but only in a narrow category of cases—those involving expletives—was repetition required. That requirement, which until the *Golden Globe Awards Order* effectively exempted isolated expletives from indecency enforcement, had no application to other material, including sexually graphic images or nudity. That is why the Commission in *Young Broadcasting* expressly rejected the contention that the indecent images at issue were "equivalent to other instances in which the Commission has ruled that fleeting remarks in live, unscripted broadcasts do not meet the indecency definition." 19 F.C.C.R. at 1755 ¶ 12. By focusing on the Commission's general indecency framework, and not specifically on the FCC's treatment of fleeting material, the court ignored the FCC's long-

standing policy of distinguishing between isolated expletives and other brief material.[2]

3. The policy that the court of appeals attributed to the Commission, under which offensive words and images were purportedly treated as interchangeable, is also at odds with the court of appeals' own recognition that televised images are qualitatively different from spoken language. See *United States* v. *Martin*, 746 F.2d 964, 971-972 (3d Cir. 1984) ("The hackneyed expression, 'one picture is worth a thousand words' fails to convey adequately the comparison between the impact of the televised portrayal of actual events upon the viewer * * * and that of the spoken or written word upon the listener or reader."). Given the power of images, there is no reason to believe that simply because the Commission permitted an exemption for isolated expletives, it

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[2] The court of appeals also stated that in refusing to grant a petition to deny a license renewal in *In re WGBH Educational Foundation*, 69 F.C.C.2d 1250 (1978) (*WGBH*), "the FCC made no distinction between words and images (nudity or otherwise)." App., *infra*, 30a-31a. But although the petitioner in that case complained that the licensee had broadcast a variety of allegedly indecent material, including "nudity," *WGBH*, 69 F.C.C.2d at 1250 ¶ 2, the Commission's order did not discuss the allegation of nudity at all, *id.* at 1254 ¶ 10 & n.6 (examining the complained-of "words"). Likewise, nothing of significance can be gleaned from the various unpublished staff decisions dismissing indecency complaints involving "some variety of sexually explicit imagery." App., *infra*, 31a. The Commission is not bound by unpublished decisions of its staff where, as here, it has not endorsed them. *Comcast Corp.* v. *FCC*, 526 F.3d 763, 769 (D.C. Cir. 2008); 47 C.F.R. 0.445(e). More importantly, as the court of appeals recognized, the staff letters "summarily rejected each of these complaints as 'not actionably indecent.'" App., *infra*, 31a. That the Commission staff used "identical form letters" to announce summary dismissals of indecency complaints says nothing about the staff's analysis, which was not set forth in the letters. *Id.* at 32a.

would allow a parallel exemption for brief displays of sexual organs or activities during times of day when children are in the audience.

4. The broadcast at issue here occurred at a time, and under circumstances, that made virtually certain it would attract a large audience of children and adults. The 2004 Super Bowl, viewed by 90 million Americans, was the most-watched Super Bowl up to that time and the highest-rated program of the 2003-2004 television season among viewers of all ages. The Commission received an "unprecedented number" of complaints about the halftime show, and the act of public indecency that was broadcast to the nation subsequently became the focus of congressional hearings. See pp. 6-7, *supra*. If left uncorrected, the court of appeals' decision will preclude the Commission from imposing any sanction for the most widely-viewed violation of the indecency prohibition in the country's history.

More generally, the Third Circuit's decision in this case calls into question key aspects of the Commission's broadcast-indecency enforcement regime. Specifically, it threatens the Commission's ability to take enforcement action with respect to any of the numerous pending complaints involving the broadcast of brief images, and perhaps even brief sexually explicit language other than expletives. The court below held that the Commission's *Golden Globe Awards Order* had excised only "fleeting expletives" from its enforcement exemption, and that "a residual policy on other categories of fleeting material—including all broadcast content other than expletives—remained in effect." App., *infra*, 23a. If that reading of the regulatory history were correct, the Commission would be disabled from taking action against any "fleeting" broadcast indecency that did not involve

expletives, such as brief nudity, depictions of sexual intercourse, or sexually explicit comments, until it attempted to explain the "change" from its alleged prior policy of immunizing such material from liability. Even if the FCC articulated an explanation of its preferred policy that the court of appeals regarded as adequate, the Commission could not impose or enforce forfeitures with respect to broadcasts that are the subject of pending complaints.

B. The Petition Should Be Held Pending This Court's Decision In *Fox* And Disposed Of As Appropriate In Light Of That Decision

In *Fox*, this Court is currently considering whether the Commission adequately explained its decision to abandon a policy of exempting isolated expletives from indecency enforcement. In making that determination, the Court will presumably consider what that prior policy was. Significantly, the order under review in *Fox* stated that "[i]n evaluating whether material is patently offensive, the Commission's approach has generally been to examine all factors relevant to that determination. To the extent that Commission dicta had previously suggested that one of these factors—whether material had been repeated—would always be decisive *in a certain category of cases*, we believe that such dicta was at odds with the Commission's overall enforcement policy and was appropriately disavowed." *In re Complaints Regarding Various Television Broads. Between Feb. 2, 2002 and Mar. 8, 2005*, 21 F.C.C.R. at 13,308 ¶ 23 (footnote omitted) (emphasis added). Although the Second Circuit held that the Commission had not sufficiently explained its departure from prior policy, the court did not disagree with the Commission's description

of the earlier policy. Rather, the Second Circuit stated that the Commission's "consistent[]" interpretation had been that "isolated, non-literal, fleeting *expletives*" were outside its indecency enforcement policies. *Fox*, 489 F.3d at 455 (emphasis added).

The parties in *Fox* disagree as to the contours of the FCC's prior policy, and that disagreement may have a direct bearing on the issue presented here. Consistent with the Commission's order in *Fox* and the view of the Second Circuit, the government maintains that "[u]ntil recently, the Commission made one factor dispositive in its analysis in certain cases by holding that the utterance of a single vulgar expletive could not be found indecent, no matter how strongly other contextual factors weighed in favor of such a finding." Gov't Br. at 17, *Fox*, *supra* (No. 07-582). If the Court holds that the FCC in *Fox* properly decided to conform its approach to isolated expletives with its approach to all other broadcast material claimed to be indecent, it will cast serious doubt on, if not necessarily reject, the view of the court below, see App., *infra*, 37a, that the Commission's prior exemption for fleeting material was *not* limited to expletives.

At the same time, Fox and the other networks (including CBS) have maintained in *Fox* that "[t]here was never a *per se* rule against liability for isolated expletives," Fox Resp. Br. at 19, *Fox*, *supra* (No. 07-582), and that "[c]ontext has *always* been the touchstone of the FCC's indecency policy, with repetition being merely one aspect of that analysis," *id.* at 26 (emphasis added); see *ibid.* (arguing that the suggestion that such an exemption for isolated expletives existed "is simply incorrect"); NBC Resp. Br. at 53 n.19, *Fox*, *supra* (No. 07-582) ("[T]here has never been an 'automatic exemption to the indecency prohibition for nonrepeated exple-

tives.'"). That position, too, is inconsistent with the view of the court below that until the *Golden Globe Awards Order*, "the FCC's policy" included an exemption for *all* "fleeting broadcast material." App., *infra*, 18a. As a result, even if respondents' position were to prevail in *Fox*, the Court's decision could cast substantial doubt on the correctness of the decision below.[3]

[3] The government does not seek review of the court of appeals' discussion of the level of scienter necessary for the Commission to impose a monetary forfeiture on CBS. App., *infra*, 39a-79a. As Judge Rendell recognized, those statements by the panel majority were "dicta," given the court's threshold ruling that the Commission's enforcement policy was invalid under the APA. *Id.* at 81a. Moreover, if this Court were to overturn the court of appeals' judgment that the Commission's order embodied an unacknowledged change in policy, then—even accepting the scienter analysis of the panel majority—the Commission would be free to impose a forfeiture on remand so long as it could demonstrate that CBS "acted recklessly and not merely negligently when it failed to implement a video delay mechanism for the Halftime Show broadcast." *Id.* at 79a.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *FCC* v. *Fox Television Stations, Inc.*, No. 07-582. The Court then should determine whether to grant certiorari, vacate the decision below, and remand the matter for further consideration in light of the decision in *Fox*, or instead to grant certiorari and to proceed with plenary review.

Respectfully submitted.

GREGORY G. GARRE
Solicitor General

GREGORY G. KATSAS
Assistant Attorney General

MALCOLM L. STEWART
Deputy Solicitor General

ERIC D. MILLER
Assistant to the Solicitor General

THOMAS M. BONDY
Attorney

MATTHEW B. BERRY
General Counsel

JOSEPH R. PALMORE
Deputy General Counsel

JACOB M. LEWIS
Associate General Counsel
Federal Communications Commission

NOVEMBER 2008

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 06-3575

CBS CORPORATION; CBS BROADCASTING INC.;
CBS TELEVISION STATIONS, INC.; CBS STATIONS
GROUP OF TEXAS L.P.; AND KUTV HOLDINGS, INC.,
PETITIONERS

v.

FEDERAL COMMUNICATION COMMISSION;
UNITED STATES OF AMERICA, RESPONDENTS

Argued: Sept. 11, 2007
Filed: July 21, 2008
As Amended: Aug. 6, 2008

OPINION OF THE COURT

Before: SCIRICA, Chief Judge, RENDELL and FUENTES, Circuit Judges.

SCIRICA, Chief Judge.

In this petition for review, CBS appeals orders of the Federal Communications Commission imposing a monetary forfeiture under 47 U.S.C. § 503(b) for the broadcast of "indecent" material in violation of 18 U.S.C. § 1464 and 47 C.F.R. § 73.3999. The sanctions stem from CBS's live broadcast of the Super Bowl XXXVIII Halftime Show, in which two performers deviated from

the show's script resulting in the exposure of a bare female breast on camera, a deceitful and manipulative act that lasted nine-sixteenths of one second. CBS transmitted the image over public airwaves, resulting in punitive action by the FCC.

CBS challenges the Commission's orders on constitutional, statutory, and public policy grounds. Two of the challenges are paramount: (1) whether the Commission acted arbitrarily and capriciously under the Administrative Procedure Act, 5 U.S.C. § 706, in determining that CBS's broadcast of a fleeting image of nudity was actionably indecent; and (2) whether the Commission, in applying three theories of liability—traditional *respondeat superior* doctrine, an alternative theory of vicarious liability based on CBS's duties as a broadcast licensee, and the "willfulness" standard of the forfeiture statute—properly found CBS violated the indecency provisions of 18 U.S.C. § 1464 and 47 C.F.R. § 73.3999. We will vacate the FCC's orders and remand for further proceedings consistent with this opinion.

I.

On February 1, 2004, CBS presented a live broadcast of the National Football League's Super Bowl XXXVIII, which included a halftime show produced by MTV Networks.[1] Nearly 90 million viewers watched the Halftime Show, which began at 8:30 p.m. Eastern Standard Time and lasted about fifteen minutes. The Halftime Show featured a variety of musical performances by contemporary recording artists, with Janet Jackson as the an-

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[1] At that time, both CBS and MTV Networks were divisions of Viacom, Inc.

nounced headlining act and Justin Timberlake as a "surprise guest" for the final minutes of the show.

Timberlake was unveiled on stage near the conclusion of the Halftime Show. He and Jackson performed his popular song "Rock Your Body" as the show's finale. Their performance, which the FCC contends involved sexually suggestive choreography, portrayed Timberlake seeking to dance with Jackson, and Jackson alternating between accepting and rejecting his advances. The performance ended with Timberlake singing, "gonna have you naked by the end of this song," and simultaneously tearing away part of Jackson's bustier. CBS had implemented a five-second audio delay to guard against the possibility of indecent language being transmitted on air, but it did not employ similar precautionary technology for video images. As a result, Jackson's bare right breast was exposed on camera for nine-sixteenths of one second.

Jackson's exposed breast caused a sensation and resulted in a large number of viewer complaints to the Federal Communications Commission.[2] In response, the Commission's Enforcement Bureau issued a letter of inquiry asking CBS to provide more information about the broadcast along with a video copy of the entire Su-

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[2] The record is unclear on the actual number of complaints received from unorganized, individual viewers. In its brief, the FCC asserts it received "'an unprecedented number' of complaints about the nudity broadcast during the halftime show." FCC Br. at 12 (citation omitted). CBS disputes the calculation and significance of the viewer complaints. *See* CBS Reply Br. at 15 n.6 ("Of the 'over 542,000 complaints concerning the broadcast' the FCC claims to have received, over 85 percent are form complaints generated by single-interest groups. Approximately twenty percent of the complaints are duplicates, with some individual complaints appearing in the record up to 37 times." (citations omitted)).

per Bowl program. CBS supplied the requested materials, including a script of the Halftime Show, and issued a public statement of apology for the incident. CBS stated Jackson and Timberlake's wardrobe stunt was unscripted and unauthorized, claiming it had no advance notice of any plan by the performers to deviate from the script.

On September 22, 2004, the Commission issued a Notice of Apparent Liability finding CBS had apparently violated federal law and FCC rules restricting the broadcast of indecent material. After its review, the Commission determined CBS was apparently liable for a forfeiture penalty of $550,000.[3] CBS submitted its Opposition to the Notice of Apparent Liability on November 5, 2004.

The Commission issued a forfeiture order over CBS's opposition on March 15, 2006, imposing a forfeiture penalty of $550,000. *In re Complaints Against Various Television Licensees Concerning Their February 1, 2004 Broadcast of the Super Bowl XXXVIII Halftime Show*, 21 F.C.C.R. 2760 (2006) ("*Forfeiture Order* "). Affirming its preliminary findings, the Commission concluded the Halftime Show broadcast was indecent because it depicted a sexual organ and violated "contemporary community standards for the broadcast medium." *Id.* at ¶ 10. In making this determination, the FCC relied on a contextual analysis to find the broadcast of Jackson's exposed breast was: (1) graphic and

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[3] This figure represented the aggregate of proposed penalties against individual CBS stations. At the time the Commission issued its Notice of Apparent Liability, forfeiture penalties for indecency violations were statutorily capped at $27,500. The Commission proposed the maximum penalty for each CBS station.

explicit, (2) shocking and pandering, and (3) fleeting. *Id.* at ¶ 14. It further concluded that the brevity of the image was outweighed by the other two factors. *Id.* The standard applied by the Commission is derived from its 2001 policy statement setting forth a two-part test for indecency: (1) "the material must describe or depict sexual or excretory organs or activities," and (2) it must be "*patently offensive* as measured by contemporary community standards for the broadcast medium." *In re Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency,* 16 F.C.C.R. 7999, 8002 ¶¶ 7-8 (2001) (emphasis in original). The Commission had informed broadcasters in its 2001 policy statement that in performing the second step of the test—measuring the offensiveness of any particular broadcast—it would look to three factors: "(1) the explicitness or graphic nature of the description or depiction of sexual or excretory organs or activities; (2) whether the material dwells on or repeats at length descriptions of sexual or excretory organs or activities; (3) whether the material appears to pander or is used to titillate, or whether the material appears to have been presented for its shock value." *Id.* at ¶ 10 (emphasis omitted).

Additionally, the FCC determined CBS's actions in broadcasting the indecent image were "willful" and therefore sanctionable by a monetary forfeiture under 47 U.S.C. § 503(b)(1). *See id.* at ¶ 15. Adopting the definition of "willful" found in section 312(f)(1) of the Communications Act,[4] the Commission offered three explana-

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[4] This section of the Communications Act provides: "The term 'willful', when used with reference to the commission or omission of any act, means the conscious and deliberate commission or omission of such act,

tions for its determination of willfulness. *Id.* First, the FCC found CBS "acted willfully because it consciously and deliberately broadcast the halftime show, whether or not it intended to broadcast nudity . . . ." *Id.* Second, the FCC found CBS acted willfully because it "consciously and deliberately failed to take reasonable precautions to ensure that no actionably indecent material was broadcast." *Id.* Finally, the FCC applied a *respondeat superior* theory in finding CBS vicariously liable for the willful actions of its agents, Jackson and Timberlake. *Id.*

On April 14, 2006, CBS submitted a Petition for Reconsideration under 47 C.F.R. § 1.106, raising several arguments against the Commission's findings and conclusions. In its Order on Reconsideration, the FCC rejected CBS's statutory and constitutional challenges and reaffirmed its imposition of a $550,000 forfeiture. *In re Complaints Against Various Television Licensees Concerning Their February 1, 2004 Broadcast of the Super Bowl XXXVIII Halftime Show*, 21 F.C.C.R. 6653 (2006) ("*Reconsideration Order*"). The *Reconsideration Order* revised the Commission's approach for determining CBS's liability under the willfulness standard. The Commission reiterated its application of vicarious liability in the form of *respondeat superior* and its determination that CBS was directly liable for failing to take adequate measures to prevent the broadcast of indecent material. *See id.* at ¶ 16. But it abandoned its position that CBS acted willfully under 47 U.S.C. § 503(b)(1) by intentionally broadcasting the Halftime Show irrespec-

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irrespective of any intent to violate any provision of this Act or any rule or regulation of the Commission authorized by this Act or by a treaty ratified by the United States." 47 U.S.C. § 312(f)(1).

tive of its intent to broadcast the particular content included in the show. Instead, it determined CBS could be liable "given the nondelegable nature of broadcast licensees' responsibility for their programming." *Id.* at ¶ 23. The Commission has since elaborated on this aspect of the *Reconsideration Order*, explaining it as a separate theory of liability whereby CBS can be held vicariously liable even for the acts of its independent contractors because it holds non-delegable duties as a broadcast licensee to operate in the public interest and to avoid broadcasting indecent material. *See, e.g.*, FCC Br. at 44-45.

CBS timely filed a petition for review of the *Reconsideration Order* on July 28, 2006. It challenges the FCC's orders on several grounds, and both parties are supported by briefing from several amici.

II.

Our standard of review of agency decisions is governed by the Administrative Procedure Act, 5 U.S.C. § 706. Under the Administrative Procedure Act, we "hold unlawful and set aside agency action, findings, and conclusions" that are found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." *Id.* § 706(2)(A); *see, e.g.*, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983).

The scope of review under the "arbitrary and capricious" standard is "narrow, and a court is not to substitute its judgment for that of the agency." *State Farm*, 463 U.S. at 43, 103 S. Ct. 2856. Nevertheless, the agency must reach its decision by "examin[ing] the relevant data," and it must "articulate a satisfactory explanation

for its action including a 'rational connection between the facts found and the choice made.'" *Id.* (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168, 83 S. Ct. 239, 9 L. Ed. 2d 207 (1962)). We generally find agency action arbitrary and capricious where:

> the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. The reviewing court should not attempt itself to make up for such deficiencies; we may not supply a reasoned basis for the agency's action that the agency itself has not given.

Id. at 43, 103 S. Ct. 2856 (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 196, 67 S. Ct. 1575, 91 L. Ed. 1995 (1947)).

Our review of the constitutional questions is more searching. In cases raising First Amendment issues, we have "an obligation 'to make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" *United States v. Various Articles of Merch., Schedule No. 287*, 230 F.3d 649, 652 (3d Cir. 2000) (quoting *Bose Corp. v. Consumers Union*, 466 U.S. 485, 499, 104 S. Ct. 1949, 80 L. Ed. 2d 502 (1984) (citations omitted)).

III.

The FCC possesses authority to regulate indecent broadcast content, but it had long practiced restraint in exercising this authority. During a span of nearly three decades, the Commission frequently declined to find

broadcast programming indecent, its restraint punctuated only by a few occasions where programming contained indecent material so pervasive as to amount to "shock treatment" for the audience. Throughout this period, the Commission consistently explained that isolated or fleeting material did not fall within the scope of actionable indecency.

At the time the Halftime Show was broadcasted by CBS, the FCC's policy on fleeting material was still in effect. The FCC contends its restrained policy applied only to fleeting utterances—specifically, fleeting expletives—and did not extend to fleeting images. But a review of the Commission's enforcement history reveals that its policy on fleeting material was never so limited. The FCC's present distinction between words and images for purposes of determining indecency represents a departure from its prior policy.

Like any agency, the FCC may change its policies without judicial second-guessing. But it cannot change a well-established course of action without supplying notice of and a reasoned explanation for its policy departure. Because the FCC failed to satisfy this requirement, we find its new policy arbitrary and capricious under the Administrative Procedure Act as applied to CBS.

A.

Section 326 of the Communications Act prohibits the FCC from censoring its licensees' broadcasts.[5] Subject

[5] *See* 47 U.S.C. § 326 ("Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Com-

to this constraint, the FCC retains authority to regulate obscene, indecent, or profane broadcast content. *See* 18 U.S.C. § 1464 ("Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both."). Indecency and obscenity are distinct categories of speech. *See FCC v. Pacifica Found.*, 438 U.S. 726, 739-41, 98 S. Ct. 3026, 57 L. Ed. 2d 1073 (1978) (plurality opinion) ("*Pacifica* "). Indecency, unlike obscenity, is protected by the First Amendment. *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126, 109 S. Ct. 2829, 106 L. Ed. 2d 93 (1989). The FCC's authority to restrict indecent broadcast content is nevertheless constitutionally permissible because of the unique nature of the broadcast medium. *Pacifica*, 438 U.S. at 750-51, 98 S. Ct. 3026; *see also id.* at 755-56, 98 S. Ct. 3026 (Powell, J., concurring).

Congress authorized the FCC to impose forfeiture penalties for violations of 18 U.S.C. § 1464 in 1960.[6] But the FCC did not exercise its authority to find a broadcast statutorily "indecent" until 1975, when it issued a forfeiture penalty against Pacifica Foundation for broadcasting comedian George Carlin's "Filthy Words" monologue. *See In re Citizen's Complaint Against Pacifica Found., Station WBAI(FM), N.Y., N.Y.*, 56 F.C.C. 2d 94 (1975). Carlin's monologue, which Pacifica aired on the radio in an early-afternoon time slot, contained

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mission which shall interfere with the right of free speech by means of radio communication.").

[6] *See* 47 U.S.C. § 503(b)(1)(D) ("Any person who is determined by the Commission . . . to have . . . violated any provision of section . . . 1464 of title 18 . . . shall be liable to the United States for a forfeiture penalty.").

extensive and repetitive use of several vulgar expletives over a period of twelve minutes. *See Pacifica*, 438 U.S. at 739, 98 S. Ct. 3026.

Pacifica appealed the FCC's forfeiture order to the United States Court of Appeals for the D.C. Circuit. The FCC issued a clarification order while Pacifica's appeal was pending, expressly limiting its prior forfeiture order to the specific facts of the Carlin monologue. *In re a 'Petition for Clarification or Reconsideration' of a Citizen's Complaint against Pacifica Found., Station WBAI(FM), N.Y., N.Y.*, 59 F.C.C. 2d 892 (1976) ("*Pacifica Clarification Order*"). Expressly acknowledging the forfeiture order's potential negative impact on broadcast coverage of live events where "there is no opportunity for journalistic editing," the FCC stated its intention to exclude such circumstances from the scope of actionable indecency. *Id.* at ¶ 4 n. 1.

Following the *Pacifica Clarification Order*, the D.C. Circuit reversed the FCC's forfeiture order against Pacifica as vague and overbroad and found the agency's indecency regime constituted invalid censorship under 47 U.S.C. § 326. *Pacifica Found. v. FCC*, 556 F.2d 9, 14 (D.C. Cir. 1977). The FCC appealed and the Supreme Court reversed in a narrow plurality opinion. *See Pacifica*, 438 U.S. at 726, 98 S. Ct. 3026. The Court rejected Pacifica's statutory argument that the term "indecent" in 18 U.S.C. § 1464 only covered obscene speech. *Pacifica*, 438 U.S. at 739, 98 S. Ct. 3026. But the Court confirmed the general validity of the FCC's indecency regime, "emphasiz[ing] the narrowness of [its] holding," which it confined to the facts of the Carlin monologue. *Id.* at 750, 98 S. Ct. 3026. Justices Powell and Blackmun concurred in the judgment, writing separately in part to

reiterate the narrowness of the decision and to note the Court's holding did not "speak to cases involving the isolated use of a potentially offensive word in the course of a radio broadcast, as distinguished from the verbal shock treatment administered by respondent here." *Id.* at 760-61, 98 S. Ct. 3026 (Powell, J., concurring).

Shortly after the Court's ruling in *Pacifica*, a broadcaster's license renewal was challenged on the basis that the broadcaster had aired indecent programming. *See In re Application of WGBH Educ. Found.*, 69 F.C.C.2d 1250 (1978) ("*WGBH*"). Viewer complaints alleged the broadcaster aired several programs containing nudity and other allegedly offensive material. *Id.* at ¶ 2. Distinguishing the facts of *WGBH* from the Court's ruling in *Pacifica*, the FCC rejected the challenge and denied that *Pacifica* afforded it any "general prerogative to intervene in any case where words similar or identical to those in *Pacifica* are broadcast over a licensed radio or television station." *Id.* at ¶ 10. The FCC, noting it "intend[ed] strictly to observe the narrowness of the *Pacifica* holding" and emphasizing the language in Justice Powell's concurring opinion, *id.* at ¶ 10, concluded the single use of an expletive in a program "should not call for us to act under the holding of *Pacifica*." *Id.* at ¶ 10 n.6.

The FCC's restrained enforcement policy continued in the years following *Pacifica*. Rejecting another challenge to a broadcaster's license renewal based on the airing of allegedly indecent material, the FCC reaffirmed that isolated use of expletives in broadcasts did not constitute actionable indecency under 18 U.S.C. § 1464. *See In re Application of Pacifica Found.*, 95 F.C.C.2d 750 (1983). The complaint alleged the broad-

caster had on multiple occasions aired programming containing language such as "motherfucker," "fuck," and "shit." *Id.* at ¶ 16. The FCC held these facts did not constitute a prima facie showing of actionable indecency under 18 U.S.C. § 1464, because the complainant had failed to show the broadcasts amounted to "verbal shock treatment" as opposed to "isolated use." *Id.* at ¶ 18.

In April 1987, the FCC issued three simultaneous indecency decisions. *See In re Pacifica Found., Inc.*, 2 F.C.C.R. 2698 (1987); *In re Regents of the Univ. of Cal.*, 2 F.C.C.R. 2703 (1987); *In re Infinity Broad. Corp.*, 2 F.C.C.R. 2705 (1987). These decisions reaffirmed the Commission's restrained enforcement policy and reiterated the agency's policy that isolated or fleeting material would not be considered actionably indecent. *See, e.g., Regents of the Univ. of Cal.* at ¶ 3 ("Speech that is indecent must involve more than an isolated use of an offensive word.").

Later in 1987, reconsidering these decisions, the Commission abandoned the view that only the particular "dirty words" used in the Carlin monologue could be indecent.[7] Instead, the FCC explained it would thereafter rely on the broader terms of its generic indecency standard, which defined indecent material as "language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs, when there is a reasonable risk that children may be in

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[7] *See In re Infinity Broad. Corp.*, 3 F.C.C.R. 930, ¶ 5 (1987), *vacated in part on other grounds, Action for Children's Television v. FCC*, 852 F.2d 1332, 1337 (D.C. Cir. 1988), *superseded in part by Action for Children's Television v. FCC*, 58 F.3d 654 (D.C. Cir. 1995) (en banc).

the audience." *Id.* at ¶¶ 2, 5.[8] Even so, the FCC affirmed all three decisions on reconsideration, never indicating disagreement with those decisions' express statements that isolated or fleeting material could not be actionably indecent. *Id.*

In 2001, the broadcast industry sought clarification of the policies and rules of the FCC's indecency enforcement regime. Guidance for the industry came in the form of a policy statement issued by the Commission. *See Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency,* 16 F.C.C.R. 7999, ¶ 19 (2001) ("*Industry Guidance*"). The policy statement included multiple examples of FCC rulings as "case comparisons" highlighting the factors that had proved significant in prior indecency determinations. One of the factors noted as leading to prior determinations that a program was not actionably indecent was the "fleeting or isolated" nature of potentially indecent material in the context of the overall broadcast. *See id.* at ¶¶ 17-18.

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[8] As described in greater detail *infra*, subsequent litigation determined what time of day broadcasters could reasonably air indecent programming without expecting children to be in the audience. The D.C. Circuit Court of Appeals rejected a total ban on indecency, instructing the FCC to identify a precise time period during which broadcasters could air indecent material. *See Action for Children's Television v. FCC*, 932 F.2d 1504 (D.C. Cir. 1991) ("*ACT I*"), *superseded in part by Action for Children's Television v. FCC*, 58 F.3d 654 (D.C. Cir. 1995) (en banc) ("*ACT II*"). In response, the Commission adopted the safe-harbor rule of 47 C.F.R. § 73.3999. After further instruction from the D.C. Circuit in 1995, *ACT II*, the Rule was amended to its current form, which confines enforcement of indecency restrictions to the hours "between 6:00 a.m. and 10:00 p.m." *See* 47 C.F.R. § 73.3999; *In re Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464*, 10 F.C.C.R. 10558 (1995).

Soon after the Commission's issuance of the *Industry Guidance* policy statement, its restrained enforcement policy changed. In an unscripted remark during a live NBC broadcast of the Golden Globe Awards on January 19, 2003, musician Bono said "this is really, really fucking brilliant" while accepting an award. *See In re Complaints Against Various Broadcast Licenses Regarding The Airing of the "Golden Globe Awards" Program*, 19 F.C.C.R. 4975, ¶ 3 n.4 (2004) ("*Golden Globes*"). Viewers complained to the FCC about Bono's speech, but the Commission's Enforcement Bureau rejected the complaints in part because the utterance was fleeting and isolated and therefore did "not fall within the scope of the Commission's indecency prohibition." *See In re Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 18 F.C.C.R. 19859, ¶ 6 (FCC Enforcement Bureau 2003). The Enforcement Bureau specifically reaffirmed that "fleeting and isolated remarks of this nature do not warrant Commission action." *Id.*

On March 3, 2004, the full Commission reversed the Enforcement Bureau's decision. *See generally Golden Globes, supra.* Although the FCC acknowledged the existence of its restrained enforcement policy for isolated or fleeting utterances, it overruled all of its prior cases holding such instances not actionable. *Id.* at ¶ 12 ("While prior Commission and staff action have indicated that isolated or fleeting broadcasts of the 'F-Word' such as that here are not indecent or would not be acted upon, consistent with our decision today we conclude that any such interpretation is no longer good law."). But the Commission made it clear that licensees could not be held liable for broadcasting fleeting or isolated

indecent material prior to its *Golden Globes* decision. *See id.* at ¶ 15 & n.40 (declining to impose a forfeiture penalty because "existing precedent would have permitted [the Golden Globe Awards] broadcast" and therefore it would be "inappropriate" to sanction licensees for conduct prior to notice of policy change).[9]

The FCC's new indecency policy created in *Golden Globes* was soon challenged by the broadcast industry. On February 21, 2006, the Commission issued an omnibus order resolving multiple indecency complaints against television broadcasters in an effort to "provide substantial guidance to broadcasters and the public about the types of programming that are impermissible under our indecency standard." *In re Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, 21 F.C.C.R. 2664, ¶ 2 (2006) ("*Omnibus Order*"). The *Omnibus Order* found four programs indecent and profane: (1) Fox's broadcast of the 2002 Billboard Music Awards, in which performer Cher used an unscripted expletive during her acceptance speech; (2) Fox's broadcast of the 2003 Billboard Music Awards, in which presenter Nicole Richie used two unscripted expletives; (3) ABC's broadcast of various episodes of its NYPD Blue series, in which assorted characters used scripted expletives; and (4) a CBS broadcast of The Early Show, in which a guest used an unscripted expletive during a live interview. *Id.* at

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[9] The Commission also cited *Trinity Broad. of Fla., Inc. v. FCC*, 211 F.3d 618 (D.C. Cir. 2000), explaining that the court in *Trinity* "reversed [a] Commission decision that denied a renewal application for abuse of process in connection with the Commission's minority ownership rules because the court found the Commission had not provided sufficiently clear notice of what those rules required." *Golden Globes* at ¶ 15 n.40.

¶¶ 101, 112 n.64, 125, 137. Applying its policy announced in *Golden Globes*, the Commission found the broadcasts indecent despite the fleeting and isolated nature of the offending expletives. *Id.* at ¶¶ 104, 116, 129, 140.

As in *Golden Globes*, the Commission recognized the inequity in retroactively sanctioning the conduct of broadcast licensees. Because the offending broadcasts occurred prior to the issuance of its *Golden Globes* decision, the FCC concluded that existing precedent would have permitted the broadcasts. *Id.* Accordingly, the FCC did not issue forfeiture orders against any of the licensees. *Id.* at ¶¶ 111, 124, 136, 145.

The networks appealed the *Omnibus Order*, and the cases were consolidated before the United States Court of Appeals for the Second Circuit. Granting a request by the FCC, the court remanded the matter to allow the Commission an opportunity to address the petitioners' arguments. After soliciting public comment, the FCC issued a new order on November 6, 2006, reaffirming its indecency findings against Fox for the 2002 and 2003 Billboard Music Awards but reversing its finding against CBS for The Early Show broadcast and dismissing the complaint against ABC on procedural grounds. *See In re Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, 21 F.C.C.R. 13299 (2006) ("*Fox Remand Order*").

The networks' original appeal to the Second Circuit was reinstated on November 8, 2006, and consolidated with a petition for review of the *Fox Remand Order*. *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 454 (2d Cir. 2007) ("*Fox*"), *cert. granted*, ___ U.S. ___, 128 S. Ct. 1647, 170 L. Ed. 2d 352 (2008) (No. 07-582). The

court granted motions to intervene by other networks, including CBS, and the networks collectively raised several challenges to the validity of the *Fox Remand Order* essentially mirroring those raised in this case. *See Fox,* 489 F.3d at 454.

Undertaking a thorough review of the history of the FCC's indecency regime similar to that which we engage in here, the Second Circuit found the FCC's "consistent enforcement policy" prior to the *Golden Globes* decision excluded fleeting or isolated expletives from regulation. *Id.* at 455. The court concluded "there is no question" that the FCC changed its policy with respect to fleeting expletives, and that the policy "changed with the issuance of *Golden Globes.*" *Id.* (citations omitted). Judge Leval, dissenting in *Fox* for other reasons, agreed with the majority's conclusion that the FCC changed its position on fleeting utterances, although he considered the change of standard "relatively modest. *See id.* at 469 (Leval, J., dissenting); *see also id.* at 470 (Leval, J., dissenting) (stating that the FCC changed its position and finding that the FCC clearly acknowledges that its *Golden Globes* and *Fox Remand Order* rulings were not consistent with its prior standard). We agree that the *Golden Globes* decision represented a policy departure by the FCC. The extensive history detailed above demonstrates a consistent and entrenched policy of excluding fleeting broadcast material from the scope of actionable indecency.

In spite of this history, the FCC contends that by February 1, 2004 (the date of the Halftime Show), a broadcaster in CBS's position should have known that even isolated or fleeting indecent material in programming could be actionable. Despite its announced rever-

sal of prior policy in its *Golden Globes* decision on March 3, 2004, the Commission points to one sentence in its 2001 policy statement to support its position: "[E]ven relatively fleeting references may be found indecent where other factors contribute to a finding of patent offensiveness." *Industry Guidance* at ¶ 19.[10] But when read in its original context rather than as an isolated statement, this sentence does not support the Commission's assertion here. The "relatively fleeting references" identified by that sentence are distinguishable from the truly "fleeting" broadcast material the FCC had included in its fleeting material policy. The paragraph cites, for instance, a notice of apparent liability against WEZB-FM, New Orleans, to exemplify the kind of "relatively fleeting references" the FCC considered

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[10] In its 2001 policy statement, the Commission described the "principal factors that have proved significant in [its] decisions to date" as: "(1) the *explicitness or graphic nature* of the description or depiction of sexual or excretory organs or activities; (2) whether the material *dwells on or repeats at length* descriptions of sexual or excretory organs or activities; (3) *whether the material appears to pander or is used to titillate*, or *whether the material appears to have been presented for its shock value.*" *Industry Guidance* at ¶ 10 (emphasis in original). It has since contended that its fleeting material policy was no policy at all, asserting instead that the fleeting nature of material was only a consideration under the second factor and could be outweighed by the other two factors depending on the specific facts of a case. But as we detail *infra*, this assertion contradicts the history of the Commission's indecency enforcement regime and is foreclosed by the agency's admissions in *Golden Globes* and *Fox*, which are controlling here, that its prior policy was to exclude fleeting material from the scope of actionable indecency. Although the FCC disputes the breadth of its policy, now contending the policy was limited only to fleeting expletives or alternatively to fleeting utterances, the fleeting nature of broadcast material was unquestionably treated by the FCC as more than one of several contextual factors subject to balancing.

actionably indecent. *See id.* (citing *EZ New Orleans, Inc. WEZB(FM),* 12 F.C.C.R. 4147 (FCC 1997) ("*WEZB-FM NAL*")). The citation to *WEZB-FM NAL* specifically describes as indecent an "announcer joke" involving incest, forceful sexual contact with children, and a reference to cleaning "blood off [a] diaper." *Id.* The "announcer joke" is distinguishable on its face from "fleeting" material such as a brief glimpse of nudity or isolated use of an expletive. Moreover, the "announcer joke" was merely one incident among dozens included in a transcript supporting the forfeiture liability determination in the *WEZB-FM NAL.*[11]

Nevertheless, as it clarified at oral argument, the FCC relies on its 2001 *Industry Guidance* to contend its policy on fleeting or isolated material "was a policy with respect to cases relying solely on the use of expletives." As the Commission explained at oral argument, "[t]here was not a policy that all short utterances were exempt." This reading of the Commission's policy on fleeting material is untenable. Even the FCC's *Industry Guidance* fails to support such a narrow characterization. *See, e.g., Industry Guidance* at ¶ 18 (quoting *L.M. Commc'ns of S.C., Inc. (WYBB(FM)),* 7 F.C.C.R. 1595 (FCC 1992), for the proposition that " 'a fleeting or isolated utterance

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[11] The *WEZB-FM NAL* found a broadcast licensee apparently liable for a forfeiture penalty of $12,000 for its broadcast of indecent material during six radio broadcasts spanning fourteen hours of airtime over nearly a one year period. The *WEZB-FM NAL* provides transcript excerpts from these broadcasts, which involved very graphic segments discussing a variety of sexual topics in extended detail. The "announcer joke" included in the FCC's *Industry Guidance* was merely one of these factual predicates for the broadcast licensee's forfeiture liability for indecency.

. . . , within the context of live and spontaneous programming, does not warrant a Commission sanction.'").

Accordingly, we find the Commission's unsubstantiated contentions in this regard contradict the lengthy history of the Commission's restrained enforcement policy. While "an agency's interpretation of its own precedent is entitled to deference," *Cassell v. FCC*, 154 F.3d 478, 483 (D.C. Cir. 1998), deference is inappropriate where the agency's proffered interpretation is capricious. Until its *Golden Globes* decision in March of 2004, the FCC's policy was to exempt fleeting or isolated material from the scope of actionable indecency. Because CBS broadcasted the Halftime Show prior to *Golden Globes*, this was the policy in effect when the incident with Jackson and Timberlake occurred.

B.

If the FCC's restrained enforcement policy for fleeting broadcast material was intact until the *Golden Globes* decision in March of 2004, our inquiry would end with a simple examination of the chronology of the FCC's actions. CBS broadcasted the Halftime Show more than a month prior to *Golden Globes*. The Commission's orders here would amount to a retroactive application of the new policy it announced in *Golden Globes*, which would raise due process concerns. The Commission has recognized the inequity in such an outcome. *See Omnibus Order*, *supra*, at ¶¶ 111, 124, 136, 145 (declining to issue forfeiture orders because the offending broadcasts occurred prior to the issuance of its *Golden Globes* decision, and therefore "existing precedent would have permitted [the] broadcasts"); *see also Trinity Broad. of Fla., Inc.*, 211 F.3d at 628 ("Because '[d]ue

process requires that parties receive fair notice before being deprived of property,' we have repeatedly held that '[i]n the absence of notice—for example, where the regulation is not sufficiently clear to warn a party about what is expected of it—an agency may not deprive a party of property by imposing civil or criminal liability.'" (citation omitted)).

But the FCC urges another reading of *Golden Globes*, perhaps less obvious yet still plausible, which interprets *Golden Globes* as addressing only the broadcast of fleeting expletives, not other fleeting material such as brief images of nudity. Further, the Commission contends its fleeting material policy, as initially adopted, was limited to fleeting words and did not extend to fleeting images. Under this view, *Golden Globes* would be inapposite here—the Commission's sanction against CBS would be in line with its treatment of images as part of its historical indecency enforcement regime. If, as the FCC contends, *Golden Globes* was limited to fleeting expletives, then its orders issuing forfeiture penalties in this case did not constitute a retroactive application of the policy change in *Golden Globes*.

But even if we accept the FCC's interpretation of *Golden Globes* and read it as only addressing fleeting expletives, the Commission's view of the scope of its fleeting materials policy prior to *Golden Globes* is unsustainable. As we will explain, the Commission—before *Golden Globes*—had not distinguished between categories of broadcast material such as images and words. Accordingly, even if, as the FCC contends, *Golden Globes* only addressed expletives, it nevertheless represented the first time the Commission distinguished between formats of broadcast material or singled out any

one category of material for special treatment under its fleeting material policy. That is, it altered the scope of the FCC's fleeting material policy by excising only one category of fleeting material—fleeting expletives—from the policy. And it therefore did not constitute an abdication of its fleeting material policy. Rather, a residual policy on other categories of fleeting material—including all broadcast content other than expletives—remained in effect.

Accordingly, subsequent agency action was required to change the fleeting material policy as it applied to broadcast content other than expletives. By targeting another category of fleeting material—fleeting images—in its orders against CBS in this case, the FCC apparently sought to further narrow or eliminate the fleeting material policy as it existed following *Golden Globes*. The Commission's determination that CBS's broadcast of a nine-sixteenths of one second glimpse of a bare female breast was actionably indecent evidenced the agency's departure from its prior policy. Its orders constituted the announcement of a policy change—that fleeting images would no longer be excluded from the scope of actionable indecency.

The question is whether the FCC's departure from its prior policy is valid and enforceable as applied to CBS. As noted, agencies are free to change their rules and policies without judicial second-guessing. *See, e.g., Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 863, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). But an agency cannot ignore a substantial diversion from its prior policies. *See Ramaprakash v. FAA*, 346 F.3d 1121, 1124 (D.C. Cir. 2003) (agency must "provide a reasoned analysis indicating that prior policies

and standards are being deliberately changed, not casually ignored"). As the Supreme Court explained in *State Farm*, an agency must be afforded great latitude to change its policies, but it must justify its actions by articulating a reasoned analysis behind the change:

> Petitioner . . . contend[s] that the rescission of an agency rule should be judged by the same standard a court would use to judge an agency's refusal to promulgate a rule in the first place—a standard Petitioner believes considerably narrower than the traditional arbitrary and capricious test and "close to the borderline of nonreviewability." We reject this view. . . . Petitioner's view would render meaningless Congress' authorization for judicial review of orders revoking . . . rules. Moreover, the revocation of an extant regulation is substantially different than a failure to act. Revocation constitutes a reversal of the agency's former views as to the proper course. A "settled course of behavior embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress. There is, then, at least a presumption that those policies will be carried out best if the settled rule is adhered to." Accordingly, "an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance."

463 U.S. at 42-43, 103 S. Ct. 2856 (citations omitted).

The agency's obligation to supply a reasoned analysis for a policy departure requires an affirmative showing on record. It "must examine the relevant data and artic-

ulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Id.* at 43, 103 S. Ct. 2856 (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168, 83 S. Ct. 239, 9 L. Ed. 2d 207 (1962)). A reviewing court "must 'consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.'" *Id.* (citations omitted). The agency's actions will then be set aside as "arbitrary and capricious" if the agency failed to provide a "reasoned explanation" for its decision to change course. *Massachusetts v. EPA*, U.S.—, 127 S. Ct. 1438, 1463, 167 L. Ed. 2d 248 (2007); *see State Farm*, 463 U.S. at 42-43, 103 S. Ct. 2856; *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981, 125 S. Ct. 2688, 162 L. Ed. 2d 820 (2005) ("unexplained inconsistency" in agency practice is a reason for holding a policy reversal "arbitrary and capricious" under the APA, unless "the agency adequately explains the reasons for a reversal of policy").

In *Fox*, the Second Circuit analyzed the FCC's changed policy on fleeting expletives under State Farm,[12] but

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[12] It was undisputed that the FCC changed its policy on fleeting expletives in *Golden Globes*, which was decided prior to *Fox*. But as the *Fox* court explained, the actual moment the agency changed its course was not pertinent in determining whether the change was valid under *State Farm*:

> [W]e . . . reject the FCC's contention that our review here is narrowly confined to the specific question of whether the two Fox broadcasts . . . were indecent. The [*Fox Remand Order*] applies the policy announced in *Golden Globes*. If that policy is invalid, then we cannot sustain the indecency findings against *Fox*. Thus, as the Commission conceded during oral argument, the validity of the new "fleeting expletive" policy announced in Golden Globes and applied in

the panel split on the outcome of its analysis. Judge Pooler, writing for the majority, found the policy change arbitrary and capricious because the FCC failed to provide a reasoned explanation for the change. *Fox*, 489 F.3d at 455 ("The Networks contend that the Remand Order is arbitrary and capricious because the FCC has made a 180-degree turn regarding its treatment of 'fleeting expletives' without providing a reasoned explanation justifying the about-face. We agree."). Scrutinizing the sufficiency of the Commission's explanation for its policy change, the court rejected the agency's proffered rationale as "disconnected from the actual policy implemented by the Commission." *Id.* at 459 n.8 (citation omitted).

Judge Leval, writing in dissent, also applied *State Farm*, but he disagreed with the amount of deference the majority afforded the FCC's policy decision. Although he agreed that the FCC was obligated to provide a reasoned explanation for its policy shift, he found the agency's explanation sufficient. As Judge Leval explained:

> In my view, in changing its position on the repetition of an expletive, the Commission complied with these requirements. It made clear acknowledgment that its *Golden Globes* and *Fox Remand Order* rulings were not consistent with its prior standard regarding

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the [*Fox Remand Order*] is a question properly before us on this petition for review.

Fox, 489 F.3d at 454. To hold otherwise would create a situation ripe for manipulation by an agency. *Cf. Action for Children's Television v. FCC*, 852 F.2d 1332, 1337 (D.C. Cir. 1988), *superseded in part by ACT II*, *supra* note 8 ("[A]n agency may not resort to [ad hoc] adjudication as a means of insulating a generic standard from judicial review.").

> lack of repetition. It announced the adoption of a new standard. And it furnished a reasoned explanation for the change. Although one can reasonably disagree with the Commission's new position, its explanation . . . is not irrational, arbitrary, or capricious. The Commission thus satisfied the standards of the Administrative Procedure[ ] Act.

Id. at 470 (Leval, J., dissenting).

In this case, *State Farm* also provides the correct standard of review, but we need not engage in the substantive inquiry that divided the Second Circuit panel in *Fox*. There, as Judge Leval noted in dissent, the FCC provided an explanation for changing its policy on fleeting expletives. The critical question splitting the court was whether that explanation was adequate under *State Farm*. Here, unlike in *Fox*, the FCC has not offered any explanation—reasoned or otherwise—for changing its policy on fleeting images. Rather, the FCC asserts it never had a policy of excluding fleeting images from the scope of actionable indecency, and therefore no policy change occurred when it determined that the Halftime Show's fleeting image of Janet Jackson's breast was actionably indecent. Accordingly, we must determine whether the FCC's characterization of its policy history is accurate. If it is not, then the FCC's policy change must be set aside as arbitrary and capricious, because it has failed to even acknowledge its departure from its former policy let alone supply a "reasoned explanation" for the change as required by *State Farm*.

CBS contends the FCC's indecency regime treated words and images alike, so the exception for fleeting material applied with equal force to words and images.

The Commission rejects this assertion, contending its prior policy on fleeting material was limited to words alone. Although the FCC acknowledges it had never explicitly distinguished between images and words for the purpose of defining the scope of actionable indecency, it contends the existence of such a distinction was obvious, even if unstated.[13]

The Commission's conclusion on the nature and scope of its indecency regime—including its fleeting material policy—is at odds with the history of its actions in regulating indecent broadcasts. In the nearly three decades between the Supreme Court's ruling in *Pacifica* and CBS's broadcast of the Halftime Show, the FCC had never varied its approach to indecency regulation based on the format of broadcasted content. Instead, the FCC consistently applied identical standards and engaged in identical analyses when reviewing complaints of poten-

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[13] The FCC's position is difficult to reconcile with the source of its authority to regulate broadcast content. The text of 18 U.S.C. § 1464 provides: "Whoever *utters* any obscene, indecent, or profane *language* by means of radio communication shall be fined under this title or imprisoned not more than two years, or both." *Id.* (emphasis added). Although the text on its face only reaches spoken words, it is applied broadly, as here, to reach all varieties of indecent content. But this broad interpretation of the text requires that the FCC treat words and images interchangeably in order to fit its regulation of indecent images within the boundaries of its statutory authority. Where the FCC's entire enforcement regime is built on the agency's treatment of words and images as functionally identical, it is unclear how the difference between words and images is "obvious." At minimum, the FCC cannot reasonably expect the difference between words and images to be so self-evident that broadcast licensees seeking to comply with indecency standards would interpret FCC enforcement orders narrowly based on whether the reviewed content consisted of words or images.

tial indecency whether the complaints were based on words or images.

In 2000, for example, the FCC rejected a complaint of indecency based on scenes of nudity in a television broadcast of the film "Schindler's List." *In re WPBN/ WTOM License Subsidiary, Inc.*, 15 F.C.C.R. 1838 (2000). Finding the broadcasted images not actionably indecent, the FCC noted "nudity itself is not *per se* indecent" and applied the identical indecency test the agency used to review potentially indecent language. *Id.* at ¶ 11. The Commission did not treat the nudity complaint differently—factually or legally—from a complaint for indecency based on a spoken utterance. *See id.* at ¶ 10 n.5 ("The Supreme Court has observed that contextual assessments may involve (and are not limited to) an examination of whether the actual *words or depictions* in context are, for example, vulgar or shocking, a review of the manner in which the *words or depictions* are portrayed, and an analysis of whether the allegedly *indecent material is isolated or fleeting.*" (emphasis added)). The Commission even referred in a footnote to its policy towards fleeting material, never suggesting the policy would be inapplicable because the offending broadcast content was an image rather than a word. *See id.* at ¶ 5 n.10 (explaining that contextual assessments of whether certain programming is patently offensive, and therefore actionably indecent, "may involve . . . analysis of whether the allegedly indecent material is isolated or fleeting").

The Commission took the same approach when reviewing viewer complaints against a television station for multiple broadcasts of programs containing expletives, nudity, and other allegedly indecent material. *See*

WGBH, supra.[14] Categorically denying that the programming in *WGBH* was actionably indecent,[15] the FCC distinguished the facts of *WGBH* from the Carlin monologue in *Pacifica* by invoking its restrained enforcement policy for fleeting or isolated material. *See id.* at ¶ 10 ("We intend strictly to observe the narrowness of the *Pacifica* holding. . . . Justice Powell's concurring opinion . . . specifically distinguished 'the verbal shock treatment [in *Pacifica*]' from 'the isolated use of a potentially offensive word in the course of a radio broadcast.' . . . In the case before us, petitioner has made no comparable showing of abuse by WGBH-TV of its programming discretion."); *id.* at ¶ 10 n.6 (finding that WGBH-TV's programs "differ[ed] dramatically from the concentrated and repeated assault involved in *Pacifica*"). In its indecency analysis in *WGBH*, the FCC

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[14] Among several broadcasts at issue in *WGBH* were: (1) "numerous episodes of *Monty Python's Flying Circus*, which allegedly consistently relie[d] primarily on scatology, immodesty, vulgarity, nudity, profanity and sacrilege for humor"; (2) "a program entitled *Rock Follies* . . . which [the petitioner] describe[d] as vulgar and as containing profanity" including "obscenities such as shit, bullshit, etc., and action indicating some sexually-oriented content in the program"; and (3) "other programs which allegedly contained nudity and/or sexually-oriented material." 69 F.C.C.2d 1250 at ¶ 2 (internal quotation marks omitted).

[15] The FCC contends *WGBH* is inapposite because it was a license revocation proceeding rather than a direct complaint for indecency. But its analysis in reaching its decision is instructive. Because the complainant in *WGBH* challenged the broadcaster's license based on a pattern of allegedly indecent broadcasts, the Commission expressly answered the threshold question of whether the broadcasts were indecent. Separate from the question of whether the broadcaster's actions were sufficient to revoke its license, the Commission's analysis illustrates that "words" and "depictions" were treated identically for purposes of determining whether a broadcast was actionably indecent.

made no distinction between words and images (nudity or otherwise).

As evidence that the FCC's policy on fleeting material, as it existed at the time of the Halftime Show, did not distinguish between words and images, CBS presented several complaints viewers had submitted to the FCC about allegedly indecent broadcasts. CBS Letter Br., *submitted pursuant to* Fed R. App. P. 28(j) (Aug. 13, 2007). Accompanying each complaint is a corresponding reply letter by the FCC rejecting the indecency allegation. Each complaint involves some variety of sexually explicit imagery. One letter, for example, describes the early-evening broadcast of a female adult dancer at a strip club and alleges the broadcast contained visible scenes of the woman nude from the waist down revealing exposed buttocks and "complete genital nudity" for approximately five to seven seconds. Another letter describes in part a Sunday-morning television broadcast of the movie "Devices and Desires," which included "scenes of a topless woman in bed with her lover, with her breast very clearly exposed, several scenes of a topless woman running on the beach, and several scenes of a nude female corpse, with the breasts clearly exposed."

Citing *Pacifica* and the indecency standard used to review the broadcast of potentially indecent language, the FCC summarily rejected each of these complaints as "not actionably indecent." The FCC contends these "form letters" are irrelevant, as the letters "do not even explain the grounds for the staff's conclusions that the broadcasts were not indecent, much less rely on the 'fleeting' nature of any alleged nudity as a reason for rejecting the complaints." FCC Letter Br., *submitted*

pursuant to Fed R. App. P. 28(j) (Aug. 27, 2007). But the relevance of the FCC's rejection letters is not found in their specific reasons for finding the images not actionably indecent. Rather, the rejection letters illustrate that the FCC used the identical form letters and indecency analyses to address complaints of indecent nudity that it had long used to address complaints of indecent language.

Confronted with this history of FCC enforcement of restrictions on broadcast indecency, the entirety of which reveals no distinction in treatment of potentially indecent images versus words, the FCC nevertheless finds such a distinction evident in its prior decisions. *See, e.g.*, FCC Br. at 26-27. To support this view, the FCC offers its Notice of Apparent Liability for Forfeiture in *In re Young Broadcasting of San Francisco, Inc.*, 19 F.C.C.R. 1751 (2004), issued four days before CBS's broadcast of the Halftime Show. *See Reconsideration Order* at ¶¶ 10, 36; FCC Br. at 26-27. *Young Broadcasting* involved a morning news show segment in which two performers from a production titled "Puppetry of the Penis" appeared in capes but were otherwise naked underneath the capes. *Young Broadcasting* at ¶ 13. The two men, whose act involved manipulating and stretching their genitalia to simulate various objects, performed a demonstration of their act with the agreement of the show's hosts and at the urging of off-camera station personnel. *Id.* Although the performance was directed away from the camera, the penis of one performer was fully exposed on camera for less than one second as the men turned away to act out their performance. *See id.* at ¶¶ 12, 13. Based on these facts, the Commission found the station apparently liable for a

forfeiture penalty for broadcasting indecent material. *Id.* at ¶ 16.

The FCC contends *Young Broadcasting* was not a departure from its prior indecency regime. Rather, as it explains, *Young Broadcasting* merely represented the first instance in which the Commission expressly articulated its preexisting (but unstated) policy of treating fleeting images differently from fleeting words.[16] On this view, according to the FCC, *Young Broadcasting* should have dispelled any doubts about the historical breadth of its fleeting material policy prior to the Halftime Show because it was issued a few days before CBS's broadcast. But *Young Broadcasting* is unavailing for this purpose. It makes no distinction, express or implied, between words and images in reaching its indecency determination. To the contrary, it discusses and compares several other FCC determinations on potentially indecent utterances and depictions, treating the cases interchangeably and ultimately distinguishing those cases' outcomes without any indication that the

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[16] Several statements in the FCC's own press release announcing the *Young Broadcasting* Notice of Apparent Liability belie the agency's contention here that *Young Broadcasting* accorded with its prior policies. *See* Press Release, FCC, *Comm'n Proposes to Fine Young Broadcasting of San Francisco, Inc., Statutory Maximum for Apparent Violation of Indecency Rules* (Jan. 27, 2004) (statement of Chairman Michael K. Powell: "Today, we open another front in our increased efforts to curb indecency on our nation's airwaves . . . ."); *id.* (statement of Commissioner Michael J. Copps: "I am pleased that this Commission is finally taking an initial step against indecency on television."); *id.* (statement of Commissioner Kevin J. Martin: "I hope that this step today represents the beginning of a commitment to consider each indecency complaint seriously . . . .").

format of the offending material was a relevant consideration. *See, e.g., id.* at ¶ 12 & n.35; *id.* at ¶ 14.[17]

Accordingly, *Young Broadcasting* does not support the FCC's assertion here that its policy on fleeting material had always excluded images and applied only to words. *Young Broadcasting* appears instead to be best understood as the Commission's initial effort to abandon its restrained enforcement policy on fleeting material. While the final disposition of *Young Broadcasting* was still unresolved,[18] the overarching policy departure that

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[17] One of the cases the FCC distinguished in *Young Broadcasting* was its Notice of Apparent Liability in *Flambo Broadcasting, Inc. (KFMH-FM)*, 9 F.C.C.R. 1681 (MMB 1994), which involved "a radio station's broadcast of sexual material in a crude joke" that was not found actionably indecent. *Young Broadcasting* at ¶ 12 n.35. As with the other cases it discussed in its *Young Broadcasting* Notice of Apparent Liability, the FCC did not draw any distinction between *Young Broadcasting* and *Flambo Broadcasting* based on the subject material there being words or images. But it did distinguish the two notices of apparent liability in part because: "assuming that the joke [at issue in *Flambo Broadcasting*] was cut off immediately, the staff of the then-Mass Media Bureau found that it would not have been actionably indecent because it was *brief, live, unscripted and from an outside source.*" *Young Broadcasting* at ¶ 12 n.35 (emphasis added). Notably, the facts here—a brief image of a bare female breast during the live Halftime Show broadcast resulting from an unscripted stunt by Jackson and Timberlake—are remarkably similar to the *Flambo Broadcasting* fact pattern that the FCC found readily distinguishable from the actionably indecent material in *Young* Broadcasting.

[18] *Young Broadcasting* was a notice of apparent liability, which is non-final until the implicated licensee either declines to dispute the findings in the notice or the licensee's responsive opposition is fully adjudicated. *See* FCC Br. at 13 (describing content of CBS Notice of Apparent Liability as "tentative conclusions"); *see also* 47 U.S.C. § 504(c) ("In any case where the Commission issues a notice of apparent liability looking toward the imposition of a forfeiture under this chapter,

the Commission sought to accomplish there was effectuated by a combination of its *Golden Globes* order and its orders on appeal here. The Commission's reasoning in *Young Broadcasting* is therefore illuminating here.

In *Young Broadcasting,* the Commission distinguished that case's facts from several of its prior orders. But in so doing, the Commission overlooked the fact that application of its fleeting material policy had been a determinative factor in those prior orders. For example, the licensee in *Young Broadcasting* cited for support *L.M. Communications,* 7 F.C.C.R. 1595 (1992), in which the radio broadcast of a single expletive was found not actionably indecent. *Young Broadcasting* at ¶ 12 n.35. The FCC found *L.M. Communications* "distinguishable because there was no finding that the material, in context, was pandering, titillating or intended to shock the audience." *Id.* But *L.M. Communications* made no reference to the pandering, titillating or shocking nature of the subject broadcast material. Rather, it determined the material was not actionably indecent because the "broadcast contained only a fleeting and isolated utterance which, within the context of live and spontaneous

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that fact shall not be used, in any other proceeding before the Commission, to the prejudice of the person to whom such notice was issued, unless (i) the forfeiture has been paid, or (ii) a court of competent jurisdiction has ordered payment of such forfeiture, and such order has become final."). At the time the Commission issued its *Reconsideration Order* against CBS and after its determination in *Golden Globes*, the question of whether the broadcast licensee in *Young Broadcasting* would contest the Notice of Apparent Liability in that case was still unresolved. *See Reconsideration Order* at ¶ 6 n.25 (indicating the status of the *Young Broadcasting* Notice of Apparent Liability as "response pending" at the time of the *Reconsideration Order*'s issuance).

programming, does not warrant a Commission sanction." *L.M. Commc'ns*, 7 F.C.C.R. at 1595.

The Commission's failure to acknowledge the existence of its prior policy on fleeting material in *Young Broadcasting* is illustrative of its approach here. In *Young Broadcasting*, it read the policy out of existence by substituting new rationales for its prior indecency determinations that had applied the policy. Here, the Commission is foreclosed from adopting the same approach by its admission in *Golden Globes* that the fleeting material policy existed. So it instead apparently seeks to revise the scope of the policy by contending the policy never included fleeting images. But extensive precedent over thirty years of indecency enforcement demonstrates otherwise.

Our reluctant conclusion that the FCC has advanced strained arguments to avoid the implications of its own fleeting indecency policy was echoed by our sister circuit in *Fox*:

> In [its *Omnibus Order*], the FCC "reject[s] Fox's suggestion that Nicole Richie's [use of two expletives] would not have been actionably indecent prior to our *Golden Globes* decision," and would only concede that it was "not apparent" that Cher's [use of one expletive] at the 2002 Billboard Music Awards would have been actionably indecent at the time it was broadcast. [*Id.*] at ¶¶ 22, 60. Decisions expressly overruled in *Golden Globes* were now dismissed as "staff letters and dicta," and the Commission even implied that the issue of fleeting expletives was one of first impression for the FCC in *Golden Globes*. *Id.* at ¶ 21 ("[I]n 2004, the Commission itself considered

> for the first time in an enforcement action whether a single use of an expletive could be considered indecent.").

Fox, 489 F.3d at 456 n.6. When confronted with these troublesome revisionist arguments, the FCC conceded the existence of its prior policy. *See id.* at 456 ("[I]n its brief to this court, the FCC now concedes that *Golden Globes* changed the landscape with regard to fleeting expletives." (citations omitted)); *see also id.* at 470 (Leval, J., dissenting) ("[The FCC] made clear acknowledgment that its *Golden Globes* and *Fox Remand Order* rulings were not consistent with its prior standard regarding lack of repetition."). But it has made no such concession here. Faced with extensive evidence to the contrary, the Commission nevertheless continues to assert that its fleeting material policy was limited to words and did not exclude fleeting images from the scope of actionable indecency.

In sum, the balance of the evidence weighs heavily against the FCC's contention that its restrained enforcement policy for fleeting material extended only to fleeting words and not to fleeting images. As detailed, the Commission's entire regulatory scheme treated broadcasted images and words interchangeably for purposes of determining indecency. Therefore, it follows that the Commission's exception for fleeting material under that regulatory scheme likewise treated images and words alike. Three decades of FCC action support this conclusion. Accordingly, we find the FCC's conclusion on this issue, even as an interpretation of its own policies and precedent, "counter to the evidence before the agency" and "so implausible that it could not be ascribed to a

difference in view or the product of agency expertise." *State Farm*, 463 U.S. at 43, 103 S. Ct. 2856.

Because the Commission fails to acknowledge that it has changed its policy on fleeting material, it is unable to comply with the requirement under *State Farm* that an agency supply a reasoned explanation for its departure from prior policy.[19] *See id.*; cf. *Ramaprakash*, 346 F.3d at 1125 ("[F]ailure to come to grips with conflicting precedent constitutes an [agency's] inexcusable departure from the essential requirement of reasoned decision making."); *LeMoyne-Owen College v. NLRB*, 357 F.3d 55, 61 (D.C. Cir. 2004) (Roberts, J.) ("[W]here, as here, a party makes a significant showing that analogous cases have been decided differently, the agency must do more than simply ignore that argument. . . . The need for an explanation is particularly acute when an agency is applying a multi-factor test through case-by-case adjudication."). Consequentially, the FCC's new policy of including fleeting images within the scope of actionable indecency is arbitrary and capricious under *State Farm* and the Administrative Procedure Act, and therefore invalid as applied to CBS.

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[19] In its brief and at oral argument, the Commission continues to assert it has not changed its policy on fleeting material, yet it also suggests several reasons why a policy including fleeting images within the scope of actionable indecency is reasonable. *But see State Farm*, 463 U.S. at 50, 103 S. Ct. 2856 ("[T]he courts may not accept appellate counsel's post hoc rationalizations for agency action. It is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself." (internal citations omitted)).

IV.

The FCC's arbitrary and capricious change of policy on the broadcast of fleeting indecent material should be a sufficient ground to decide this case. But if not, it would appear the Commission incorrectly determined CBS's liability for Jackson and Timberlake's Halftime Show performance.[20] CBS contends it neither planned Jackson and Timberlake's offensive actions nor knew of the performers' intent to incorporate those actions into their performance. The FCC does not dispute this assertion, but it nevertheless seeks to hold CBS liable for the performers' actions. The Commission offers three theories of liability. First, the FCC contends the performers' intent can be imputed to CBS under the common law doctrine of *respondeat superior*. Second, the FCC contends CBS's unique duties as a broadcast licensee permit an extension of vicarious liability beyond the traditional employer-employee scope of *respondeat superior*. Third, the FCC contends CBS is directly liable for the performers' actions because it "willfully" failed to take adequate measures to guard against a known risk that indecency might occur during the Halftime Show.

At this juncture, we do not believe these theories provide grounds for CBS's liability. Jackson and Timberlake were independent contractors, who are outside the scope of *respondeat superior*, rather than employees as the FCC found. The First Amendment precludes the FCC from sanctioning CBS for the indecent expressive conduct of its independent contractors without offering proof of scienter as an element of liability. And it is un-

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[20] This issue was extensively briefed by the parties and amici.

clear whether the FCC correctly applied a "willfulness" standard to find CBS liable for failing to prevent the Halftime Show's indecency.

A.

The FCC relies primarily on the traditional agency doctrine of *respondeat superior* to hold CBS vicariously liable for the actions of Janet Jackson and Justin Timberlake during the Halftime Show. The *respondeat superior* doctrine provides that "[a]n employer is subject to liability for torts committed by employees while acting within the scope of their employment." Restatement (Third) of Agency § 2.04 (2006); *see also id.* § 7.07. The doctrine's "scope is limited to the employment relationship and to conduct falling within the scope of that relationship . . . ." *Id.* § 2.04 cmt. b. Here, the parties dispute whether the conduct giving rise to liability was performed by CBS's employees. CBS asserts, and the FCC denies, that Jackson and Timberlake were independent contractors and therefore outside the scope of *respondeat superior.* CBS also contends *respondeat superior* is an unsuitable theory of liability in the broadcast indecency context and asserts the FCC's "novel" adoption of it in this case is improper.

The federal statutes restricting broadcast indecency, 18 U.S.C. § 1464, and establishing the FCC's forfeiture penalty scheme, 47 U.S.C. § 503, are silent on vicarious liability. Nevertheless, there is sound authority that CBS may be vicariously liable for the indecent speech or expression of its employees. *See Cantrell v. Forest City Pub. Co.*, 419 U.S. 245, 253-54, 95 S. Ct. 465, 42 L. Ed. 2d 419 (1974) (holding a newspaper publisher "liable under traditional doctrines of respondeat superior" for a re-

porter's story that contained knowing falsehoods injurious to the privacy of the subjects of the story); *Schiavone Constr. Co. v. Time, Inc.*, 847 F.2d 1069, 1089 n.34 (3d Cir. 1988) ("Because [reporter] Sandy Smith was an employee of Time, Time is responsible for Smith's actual malice under a theory of respondeat superior." (citing *Cantrell*, 419 U.S. at 253-54, 95 S. Ct. 465; R. Smolla, Law of Defamation § 3.36 (1986))). Accordingly, if a broadcaster's employee violates the indecency provision of 18 U.S.C. § 1464, as sanctioned through the forfeiture scheme of 47 U.S.C. § 503(b), *respondeat superior* liability may be permissible.

But even though the *respondeat superior* doctrine may apply in this context, it is limited to the conduct of employees acting within the scope of their employment. Determining whether CBS may be liable under *respondeat superior* first requires selection of the applicable legal standard for differentiating an "employee" from an "independent contractor." Neither party has adequately analyzed the issue. CBS suggests New York law applies, asserting the FCC itself determined in its orders that a choice-of-law provision included in both performers' Halftime Show agreements requires application of New York law. But it provides no additional argument in support of applying New York law. The Commission denies it ever made this determination in its orders, instead urging application of "federal law," but without elaborating or specifying the applicable legal standard.

As CBS states, the Commission, in its orders in this case, referenced the choice-of-law provisions in the Jackson and Timberlake performance agreements. *See Forfeiture Order* at ¶ 25 n.88; *Reconsideration Order* at ¶ 27 n.90. But those references by the Commission, read

in context, were not determinations of what law should apply here. Rather, as it asserts, the FCC cited New York law as one non-exhaustive example of "courts applying common law agency principles." *Reconsideration Order* at ¶ 27. And its references to the choice-of-law provisions in the performers' agreements were included only for the purpose of adding weight to its citations to New York law in this regard.

Moreover, the choice-of-law provisions in the Jackson and Timberlake performance agreements only select New York contract law. The provisions, which are identical in the two agreements, read: "CHOICE OF LAW: This Agreement and all matters or issues collateral thereto shall be governed by the laws of the State of New York applicable to contracts executed and to be performed entirely therein." The plain text of these contract provisions select "the laws of the State of New York applicable to contracts"—that is, New York contract law—in all disputes central or collateral to the contract. *Respondeat superior* is a principle of agency law. Were the present case a matter of interpreting the construction or validity of contractual provisions, New York law might well apply. But we read the contract as silent on applicable agency law, and CBS has not offered any further explanation to support a finding to the contrary.

Furthermore, even if the choice-of-law provisions had been inclusively drafted to select all categories of New York law, or if the "matters or issues collateral thereto" language of the choice-of-law provisions could be interpreted to cover this case, our conclusion would be the same. The regulation of broadcast indecency is

the province of the federal government.[21] Whether or not an agent was an "employee" of its principal—for the specific purpose of determining liability under the broadcast indecency regime—depends on the definition the federal government assigns to the term "employee" under its administrative scheme. No state's law may alter the scope or nature of liability for broadcast indecency by supplying an alternate definition.

Accordingly, we believe the FCC's contention that "federal law" applies is correct. Liability here arises under a federal regulatory scheme, and defining the boundaries of permissible vicarious liability under that scheme is likewise a federal matter. To hold otherwise would create opportunities for broadcasters to evade liability for broadcast indecency through artful drafting of contracts and would frustrate the federal government's intention of crafting uniform national rules restricting the transmission of indecent and obscene material over public airwaves. *Cf. Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 740, 109 S. Ct. 2166, 104 L. Ed. 2d 811 (1989) ("Establishment of a federal rule of agency, rather than reliance on state agency law, is particularly appropriate here given the [Copyright Act of 1976]'s express objective of creating national, uniform

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[21] The FCC possesses broad authority to regulate television broadcasters, which operate as licensees subject to federal rules. Some of those rules, such as the indecency restrictions implicated here, appear to leave little room for regulation by the States. *See Allen B. Dumont Labs. v. Carroll*, 184 F.2d 153, 156 (3d Cir. 1950) (invalidating a regulation of the Pennsylvania State Board of Censors, which required that all motion picture films intended to be broadcast by television in Pennsylvania be submitted to the Board for censorship purposes, because federal provisions on broadcast indecency, profanity and obscenity preempted state censorship rules).

copyright law by broadly pre-empting state statutory and common-law copyright regulation."). The question is how to define the scope and substance of the vicarious liability rule here—a uniform federal rule on a broadcaster's liability for its own agents' indecent acts.

In analogous situations requiring a determination of vicarious liability under a uniform, nationally-applicable law, the Supreme Court has looked to the general common law of agency rather than the law of any particular state:

> The Act nowhere defines the terms "employee" or "scope of employment." It is, however, well established that where Congress uses terms that have accumulated settled meaning under the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms. In the past, when Congress has used the term "employee" without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine. . . . [W]hen we have concluded that Congress intended such terms as "employee," "employer," and "scope of employment" to be understood in light of agency law, we have relied on the general common law of agency, rather than on the law of any particular State, to give meaning to these terms.

Reid, 490 U.S. at 739-40, 109 S. Ct. 2166 (interpreting use of the term "employee" in the Copyright Act of 1976, to ascertain whether a work was prepared by an employee or independent contractor, which is part of the determination of whether work is "for hire" under the

Act) (internal quotations and citations omitted); *see also Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323 n.3, 112 S. Ct. 1344, 117 L. Ed .2d 581 (1992) ("As in *Reid*, we construe the term ['employee' in ERISA, 29 U.S.C. § 1002(6),] to incorporate 'the general common law of agency, rather than . . . the law of any particular State.'" (quoting *Reid*, 490 U.S. at 740, 109 S. Ct. 2166)). Unlike in *Reid* or *Darden*, here we do not review a statutory scheme in which Congress expressly used the terminology of agency law. The relevant provisions of 18 U.S.C. § 1464 and 47 U.S.C. § 503(b) do not include terms such as "employee" or "scope of employment." But the *respondeat superior* doctrine's application in the broadcast indecency context is premised on the notion that some form of vicarious liability under these statutes was implicitly authorized by Congress.

Drawing on *Reid* and *Darden* for guidance, we agree with the FCC that the general common law of agency supplies the appropriate standard for determining whether Jackson and Timberlake were employees of CBS where Congress has not provided specific direction on the scope of vicarious liability in this context. In *Darden*, the Court described *Reid* as requiring a "presumption that Congress means an agency law definition for 'employee' unless it clearly indicates otherwise . . . ." *Darden*, 503 U.S. at 325, 112 S. Ct. 1344 (citations omitted). The Court's rationale is based on Congress's creation of vicarious liability without defining the scope of that liability—not whether magic words have been included in the statute:

> ERISA's nominal definition of "employee" as "any individual employed by an employer," 29 U.S.C. § 1002(6), is completely circular and explains noth-

> ing. As for the rest of the Act, Darden does not cite, and we do not find, any provision either giving specific guidance on the term's meaning or suggesting that construing it to incorporate traditional agency law principles would thwart the congressional design or lead to absurd results. Thus, we adopt a common-law test for determining who qualifies as an "employee" under ERISA, a test we most recently summarized in *Reid* . . . .

Id. at 323, 112 S. Ct. 1344 (footnote omitted). The Darden rationale applies with equal force here. Assuming Congress authorized vicarious liability at all under 18 U.S.C. § 1464 and 47 U.S.C. § 503(b), its implicit authorization by definition lacks specificity. There is little difference between implicit adoption of a rule and the explicit but "circular" and uninformative inclusion of agency law terminology in statutory text.

Moreover, the Court in *Reid* explained that the practice of relying on the general common law of agency, rather than the law of any particular state, "reflects the fact that 'federal statutes are generally intended to have uniform nationwide application.'" *Id.* at 740, 109 S. Ct. 2166 (quoting *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 43, 109 S. Ct. 1597, 104 L. Ed. 2d 29 (1989)). CBS has not offered any reason why this rule should not inform our interpretation of the federal government's regulatory scheme for broadcast indecency.[22] Accordingly, we agree with the FCC that *re*

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[22] The Supreme Court has noted the breadth and uniformity of the FCC's federal regulatory regime for the broadcast industry: The Commission's authority to regulate broadcasting and other communications is derived from the Communications Act of 1934, as amended. The Act's provisions are explicitly applicable to "all interstate and foreign

spondeat superior liability for violations of 18 U.S.C. § 1464, as sanctioned through 47 U.S.C. § 503(b) forfeiture penalties, "should be understood in light of the general common law of agency," *Reid*, 490 U.S. at 741, 109 S. Ct. 2166. And under the common law, *respondeat superior* is limited to the employer-employee relationship. *United States v. Sw. Cable Co.*, 392 U.S. 157, 167-68, 88 S. Ct. 1994, 20 L. Ed. 2d 1001 (1968) (footnotes omitted).

In *Reid*, the Court set forth a test, incorporating the Restatement definition of "employee," for determining who qualifies as an "employee" under the common law:

> In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional pro-

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communication by wire or radio . . . ." 47 U.S.C. § 152(a). The Commission's responsibilities are no more narrow: it is required to endeavor to "make available . . . to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service . . . ." 47 U.S.C. § 151. The Commission was expected to serve as the "single Government agency" with "unified jurisdiction" and "regulatory power over all forms of electrical communication, whether by telephone, telegraph, cable, or radio." It was for this purpose given "broad authority." As this Court emphasized in an earlier case, the Act's terms, purposes, and history all indicate that Congress "formulated a unified and comprehensive regulatory system for the (broadcasting) industry." *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 137, 60 S. Ct. 437, 84 L. Ed. 656 (1940).

> jects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; and the tax treatment of the hired party.

Id. at 751-52, 109 S. Ct. 2166 (internal quotations and citations omitted).

While establishing that all of these factors are relevant and that "no one of these factors is determinative," *id.* at 752, 109 S. Ct. 2166, *Reid* did not provide guidance on the relative weight each factor should be assigned when performing a balancing analysis. But the Court has indicated that determining the appropriate balance is a case-specific endeavor:

> There are innumerable situations which arise in the common law where it is difficult to say whether a particular individual is an employee or an independent contractor. . . . In such a situation . . . there is no shorthand formula or magic phrase that can be applied to find the answer, but all of the incidents of the relationship must be assessed and weighed with no one factor being decisive. What is important is that the total factual context is assessed in light of the pertinent common-law agency principles.

NLRB v. United Ins. Co. of Am., 390 U.S. 254, 258, 88 S. Ct. 988, 19 L. Ed. 2d 1083 (1968) (footnote omitted). Other courts have followed this approach. *See, e.g., Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 85 (2d Cir. 1995) ("[T]he [*Reid*] factors are weighed by referring to the

facts of a given case." (citing *Aymes v. Bonelli*, 980 F.2d 857, 861 (2d Cir. 1992))).

Accordingly, all of the *Reid* factors are relevant, and no one factor is decisive, but the weight each factor should be accorded depends on the context of the case. Some factors will have "little or no significance in determining whether a party is an independent contractor or an employee" on the facts of a particular case. *Aymes*, 980 F.2d at 861; *see Marco v. Accent Publ'g Co.*, 969 F.2d 1547, 1552 (3d Cir. 1992) (noting that three *Reid* factors were "indeterminate" on the facts of the case and according those factors little or no weight in applying *Reid*'s balancing test).[23]

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[23] In *Aymes*, the Second Circuit offered an example of how the facts of a case might diminish the significance of a *Reid* factor: The [*Reid*] factors should not merely be tallied but should be weighed according to their significance in the case.

> For example, the factors relating to the authority to hire assistants will not normally be relevant if the very nature of the work requires the hired party to work alone. In such a case, that factor should be accorded no weight in applying the *Reid* test. Having the authority to hire assistants, however, might have great probative value where the individual claiming to be an independent contractor does exercise authority to enlist assistants without prior approval of the party that hired him. In the latter case, this show of authority would be highly indicative that the hired party was acting as an independent contractor.

Aymes, 980 F.2d at 861. The court went on to specify five Reid factors that "will be significant in virtually every situation" and "should be given more weight in the analysis, because they will usually be highly probative of the true nature of the employment relationship." *Id.* These factors, according to the court, include: "(1) the hiring party's right to control the manner and means of creation; (2) the skill required; (3) the provision of employee benefits; (4) the tax treatment of the hired party; and (5) whether the hiring party has the right to assign addi-

In the present case, the FCC erred by failing to consider several important *Reid* factors when determining whether Jackson and Timberlake were employees of CBS. And rather than balancing those factors it did consider, the Commission focused almost exclusively on CBS's right of control over the performers. *See* FCC Br. at 42 ("The critical factor of control weighs so heavily in favor of a conclusion that Jackson and Timberlake were CBS's employees that, as the Commission reasonably determined, consideration of that factor alone is 'decisive.'" (citing *Reconsideration Order* at ¶ 27)).[24] Although the right-to-control factor is usually significant in determining employment status, the Commission assigned it disproportionate, even dispositive, weight

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tional projects to the hired party." *Id.* We agree that these factors will almost always be critical in determining whether a hired party is an employee or independent contractor. But we reiterate that the proper weight to be accorded any Reid factor is dependent on its significance in the relevant case.

[24] In its *Reconsideration Order*, the Commission explained that "every aspect of the performance, including the exact time, length, location, material, set, script, staging, and wardrobe, was subject to the control of Viacom/CBS through its corporate affiliate MTV." *Id.* at ¶ 26. The Commission went on to state:

> We recognize that some of the common law factors are not indicative of agency. Again, however, the relative weight of common law factors varies according to the legal context in which the agency issue arises. The central issue here is the parties' relationship for the specific purpose of imposing vicarious liability for the performers' actions in [the Halftime Show] performance that were harmful to the public (rather than for copyright, workers' compensation, anti-discrimination or other purposes). In this context, the Commission properly concluded that the evidence clearly demonstrating Viacom/CBS's right to control the halftime show performance was decisive.

Id. at ¶ 27 (footnote omitted).

here. But *Reid* stresses contextual balancing, with no one factor decisive. *See Marco*, 969 F.2d at 1552 (rejecting an application of the *Reid* test that gave "disproportionate consideration" to the factor of control, reiterating that no single factor is dispositive of employee status, and instructing that "courts should keep this factor [of control] in perspective"). Accordingly, we will review the *Reid* factors, weighed in light of the context of this case, to determine whether Jackson and Timberlake were employees or independent contractors of CBS.[25]

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[25] On appellate review, the findings of fact constituting each relevant *Reid* factor are afforded significant deference under the Administrative Procedure Act ("APA"). But balancing those factors to determine employment status is a question of law traditionally accorded no deference. *See Marco*, 969 F.2d at 1548 ("[W]e exercise plenary review of the . . . application of the law of agency to the facts." (citations omitted)); *Carter*, 71 F.3d at 85-87 (describing the question of whether a hired party is an employee or independent contractor as a "legal conclusion" and engaging in de novo balancing of the *Reid* factors); *Aymes*, 980 F.2d at 861-64 (same). In the past, we have held that agency determinations on questions of law not within the agency's expertise—such as the FCC's determination here on employment status—receive less deference under the APA than other agency conclusions. *See Nat'l Indus. Sand Ass'n v. Marshall*, 601 F.2d 689, 699 n.34 (3d Cir. 1979) ("A court may decide all relevant questions of law [d]e novo under the standard set forth in 5 U.S.C. [§]706(2)(A)." (citation omitted)). Other courts have agreed. *See, e.g., Wolfe v. Barnhart*, 446 F.3d 1096, 1100 (10th Cir. 2006) ("When we review an agency's decision under the APA's arbitrary, capricious or abuse of discretion standard, our review is narrow and deferential. . . . However, these limitations do not apply to questions of law." (citations and internal quotation omitted)); *Davidson v. Glickman*, 169 F.3d 996, 1000 (5th Cir. 1999) ("Under the APA, we review questions of law de novo, without deference to the agency's conclusions." (citations omitted)); *Wagner v. Nat'l Transp. Safety Bd.*, 86 F.3d 928, 930 (9th Cir. 1996) ("Purely legal questions are reviewed *de novo*." (citation omitted)); *Texas E. Prods. Pipeline Co. v. Occupational Safety and Health Review Comm'n*, 827 F.2d 46, 47 (7th

Only three factors weigh in favor of a determination that Jackson and Timberlake were employees of CBS. First, CBS is in business, which "increases the possibility that it would employ people." *Marco*, 969 F.2d at 1551. Second, CBS regularly produces shows for national broadcast in the course of its business. Both fac-

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Cir. 1987) ("For questions of law, the APA on its face mandates de novo review." (citing the text of 5 U.S.C. § 706: "To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law. . . .") (additional citation omitted)); *Artesian Indus., Inc. v. Dep't of Health and Human Servs.*, 646 F. Supp. 1004, 1006 (D.D.C. 1986) ("Based on the express language of the APA, the arbitrary and capricious standard applies only to 'actions, findings and conclusions,' by an agency, excluding any questions of law. The APA explicitly empowers reviewing courts to decide 'all relevant questions of law,' and the United States Court of Appeals for the District of Columbia Circuit has construed this language to mean what it says—questions of law are to be decided by courts, not agencies."(citations and footnotes omitted)).

Here, we need not resolve whether de novo review of the FCC's application of the *Reid* test is appropriate. It is true the FCC has no unique expertise in determining whether a broadcast licensee's agent is an employee or independent contractor under the general common law of agency. But even under the APA's traditionally deferential standard, we "hold unlawful and set aside" agency conclusions that are "not in accordance with law." 5 U.S.C. § 706(2)(A). And the FCC's conclusion on the performers' employment status, by placing dispositive weight on the single factor of CBS's right to control, is contrary to settled law under *Reid*. *See Marco*, 969 F.2d at 1552 (rejecting an application of the *Reid* test that gave "disproportionate consideration" to the factor of control, reiterating that no single factor is dispositive of employee status, and instructing that "courts should keep this factor [of control] in perspective"). Moreover, the FCC failed to consider several relevant *Reid* factors—an error the Supreme Court has described as sufficient to render an agency's conclusions "arbitrary and capricious" under the APA. *See State Farm*, 463 U.S. at 43, 103 S. Ct. 2856 (describing an agency's "fail[ure] to consider an important aspect of [a] problem" as "arbitrary and capricious" under the APA).

tors are relatively insignificant on balance. *See id.* (noting that a hiring party might "easily accomplish its regular business by using independent contractors rather than employees"); *Aymes*, 980 F.2d at 863 (according factor of whether hiring party is in business "negligible" weight, noting it "will always have very little weight in this analysis" and "will generally be of little help").

Third, and most significant to its argument, is the factor the FCC focused on in its orders: CBS's right to control the manner and means by which Jackson and Timberlake accomplished their Halftime Show performance. As the FCC contends, CBS, through its corporate affiliates, supervised the Halftime Show and retained the right to approve all aspects of the show's performances. But it is undisputed that CBS's actual control over the Halftime Show performances did not extend to all aspects of the performers' work. The performers, not CBS, provided their own choreography and retained substantial latitude to develop the visual performances that would accompany their songs. Similarly, as the FCC notes, CBS personnel reviewed the performers' selections of set items and wardrobes, but the performers retained discretion to make those choices in the first instance and provided some of their own materials.[26]

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[26] Furthermore, the FCC, asserting that CBS "scripted every word uttered on stage," appears to overstate CBS's scripting role. The record indicates the performers—and Jackson in particular—had a role in selecting songs to be performed at the show, all of which were previously recorded by the performers. Moreover, the songs were revised by the performers and their assistants to accommodate extra vocalists, time constraints, and other unique aspects of the Halftime Show performances.

We reviewed a comparable set of facts in *Marco*, where we held a photographer was an independent contractor even though the hiring party, a magazine, exercised significant "control over the details of the work." *Marco*, 969 F.2d at 1551. There, the magazine "supplied jewelry, props, models, sketches intended to describe the exact composition of the photographs, and, at some sessions, an Art Director." *Id.* Even though the magazine "controlled . . . the subject matter and composition of the images," we noted that other aspects of the work—"including the choice of light sources, filters, lenses, camera, perspective, aperture setting, shutter speed, and processing techniques"—were not under the magazine's control. *Id.* at 1551-52. Moreover, the Art Director—although exercising supervisory control—only supervised "some" of the sessions, and his "supervision was limited to subject matter, composition, and 'mood.'" *Id.* at 1552.

Here, as in *Marco*, CBS's control was extensive but not determinative of employment. Even though a principal's right to control is an important factor weighing in favor of a determination that an employment relationship existed, it is not dispositive when considered on balance with the rest of the *Reid* factors. Of the remaining factors significant on the facts here,[27] all are strong

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[27] Some *Reid* factors carry little or no weight in our analysis because they are indeterminate on the facts. *See Marco*, 969 F.2d at 1552 (finding some factors indeterminate based on the facts of that case). The extent of the performers' "discretion over when and how long to work" is unclear. Their performance agreements require certain scheduled appearances and rehearsals, including the Halftime Show itself, but the record indicates the performers were free to (and did) complete additional preparations at their own discretion. Similarly, the record is in

ly indicative of Jackson and Timberlake's independent contractor status. First, it is undisputed that both Jackson and Timberlake were hired for brief, one-time performances during the Halftime Show; CBS could not assign more work to the performers.[28] Second, Jackson and Timberlake selected and hired their own choreographers, backup dancers, and other assistants without any involvement on the part of CBS. Third, Jackson and Timberlake were compensated by one-time, lump-sum contractual payments and "promotional considerations" rather than by salaries or other similar forms of remittances, without the provision of employee benefits. Fourth, the skill required of a performer hired to sing and dance as the headlining act for the Halftime Show—a performance during a Super Bowl broadcast, as the FCC notes, that attracted nearly 90 million viewers and was the highest-rated show during the 2003-04 television season—is substantial even relative to the job of a general entertainer, which is itself a skilled occupation.

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conclusive on the location of the performers' work—some of which was on set and scheduled, and some of which was off set and unscheduled.

[28] This factor is accorded great weight under the common law:

> In general, employment contemplates a continuing relationship and a continuing set of duties that the employer and employee owe to each other. Agents who are retained as the need arises and who are not otherwise employees of their principal normally operate their own business enterprises and are not, except in limited respects, integrated into the principal's enterprise so that a task may be completed or a specified objective accomplished. Therefore, respondeat superior does not apply.

Restatement (Third) of Agency § 2.04 cmt. b (2006); *see also Aymes*, 980 F.2d at 861 (describing the hiring party's right to assign additional work as one of five *Reid* factors, along with control, to be "given more weight in the analysis, because [it] will usually be highly probative of the true nature of the employment relationship").

Also weighing heavily in favor of Jackson and Timberlake's status as independent contractors is CBS's assertion in its briefs, which the FCC does not refute, that it paid no employment tax. Had the performers been employees rather than independent contractors, federal law would have required CBS to pay such taxes. *See, e.g., Enochs v. Williams Packing & Nav. Co.*, 370 U.S. 1, 3, 82 S. Ct. 1125, 8 L. Ed. 2d 292 (1962) (citing statutory provisions requiring employers to pay Social Security taxes of their employees); *McDonald v. S. Farm Bureau Life Ins. Co.*, 291 F.3d 718, 721 (11th Cir. 2002) (explaining the FICA tax scheme, which requires employers to share the FICA tax liabilities of their employees but not of their independent contractors).

Finally, there is no evidence that Jackson, Timberlake, or CBS considered their contractual relationships to be those of employer-employee. In *Reid*, the Court incorporated the Restatement, describing it as "setting forth a nonexhaustive list of factors relevant to determining whether a hired party is an employee" under the common law of agency. 490 U.S. at 752, 109 S. Ct. 2166. Among the factors not explicitly listed in *Reid*, but included in the Restatement, is the parties' understanding of their contractual relationship. *See* Restatement (Third) of Agency § 7.07 cmt. f (including as an explicit factor in determining employment status "whether the principal and the agent believe that they are creating an employment relationship"). Although the Commission did not inquire into this factor, it should have been a significant consideration in this case. Under the FCC's rationale, band members contracted to play a one-song set on a talk show or a "one-show-only" televised concert special presumably would be employees of the broad-

caster. These performers—who frequently promote their work through brief contractual relationships with media outlets—would be "employees" of dozens of employers every year. Accordingly, it is doubtful that either the performers here or CBS believed their contracts created employment relationships. Nevertheless, given the lack of a developed record on this factor, we will not accord it significant weight in our analysis.

On balance, the relevant factors here weigh heavily in favor of a determination that Jackson and Timberlake were independent contractors rather than employees of CBS. The Commission erred in according the right-to-control factor disproportionate weight and in treating it as determinative without considering several significant factors weighing against it. *Cf. Reid*, 490 U.S. at 752, 109 S. Ct. 2166 ("Examining the circumstances of this case in light of these factors, we agree . . . that Reid was not an employee of CCNV but an independent contractor. True, CCNV members directed enough of Reid's work to ensure that he produced a sculpture that met their specifications. But the extent of control the hiring party exercises over the details of the product is not dispositive. Indeed, all the other circumstances weigh heavily against finding an employment relationship."). In sum, both performers were acting as independent contractors for the limited purpose of providing entertainment services for one isolated, brief program. Accordingly, the doctrine of *respondeat superior* does not apply on these facts.

B.

Although vicarious liability is traditionally limited to the employer-employee scope of *respondeat superior*,

the FCC proffers an alternative theory of liability under which CBS may be held vicariously liable for its independent contractors' actions based on its duties as a broadcast licensee. The FCC contends CBS is vicariously liable for Jackson and Timberlake's actions during the Halftime Show—irrespective of their status as independent contractors—because broadcast licensees hold non-delegable duties to avoid the broadcast of indecent material and to operate in the public interest. CBS disputes the validity of this theory as applied to them, contending it functionally creates a strict liability standard for broadcast indecency and therefore unconstitutionally eliminates the scienter element of the indecency provisions of 18 U.S.C. § 1464 and 47 C.F.R. § 73.3999(b).

1.

Broadcast licensees hold several duties as conditions of maintaining their licenses. There are good reasons to hold a broadcaster strictly liable for complying with licensing rules. Broadcasters have the right and the capability to control the manner in which they operate and conduct their business as licensees on the public airwaves. It may be argued that anything less than strict liability may relieve broadcasters of responsibility and undermine their willingness to exercise vigilance.

In some contexts, these reasons have led the FCC to adopt and enforce strict liability for broadcasters' violations of its rules and regulations. The Commission has cited several of these cases in support of its determination of CBS's liability.[29] But unlike the facts in this case,

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[29] *See, e.g., Forfeiture Order* at ¶ 23 n.80 (citing *In re Liab. of Wagenvoord Broad. Co., Licensee of Station WVOG, New Orleans, LA*, 35 F.C.C.2d 361 (1972); *In re Eure Family Ltd. P'ship*, 17 F.C.C.R. 7042,

all of the cases cited by the FCC address situations in which a third party steps into the shoes of a broadcaster, performing the broadcaster's duties by operating stations, maintaining equipment, or otherwise filling the broadcaster's role as a licensee. Essentially, these cases prohibit licensees from avoiding liability by delegating aspects of the operation and control of broadcasting facilities or equipment to third-party independent contractors.

But the Commission has cited no authority for the proposition that a broadcaster may be vicariously liable for the speech or expression of its independent contractors.[30] Cases concerning the operation or mainten-

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7044 (FCC Enforcement Bureau 2002)) (additional citations omitted). *Wagenvoord* held a broadcast licensee liable where an independent contractor "consulting engineer negligently provided erroneous advice that resulted in the violations of the station's presunrise authorization." *See Wagenvoord* at ¶ 3. Similarly, *Eure Family Limited Partnership* held a broadcast licensee liable where an independent contractor violated FCC rules by failing to properly monitor the beacon light on an antenna structure and notify the licensee of an outage. *See Eure Family Ltd. P'ship* at ¶ 7. Other FCC cases on point are likewise directed towards broadcast licensees' delegation of technical and operational duties. *See, e.g., In re Application for Review of Liab. of MTD, Inc., Permittee of Station KWMW(FM), Maljamar, NM*, 6 F.C.C.R. 34, ¶ 5 (1991) (holding licensee liable for independent contractor's violation of Commission's tower lighting rule); *In re Liab. of Sundial Broad. Corp., Licensee of Station KDFC(FM), San Francisco, CA*, 30 F.C.C.2d 949 (1971) (holding licensee liable for an independent contractor engineer's failure to make equipment performance measurements within the time period required by the Commission).

[30] *Cantrell* is inapposite for this purpose. Central to the Court's holding in *Cantrell* was the status of the reporter as an employee acting within the scope of his employment. *See Cantrell*, 419 U.S. at 253, 95 S. Ct. 465 ("[There] was sufficient evidence for the jury to find that Eszterhas' writing of the feature was within the scope of his employment

ance of broadcasting stations are inapposite to a determination of the scope of a licensee's liability for the content of its programming. A broadcast licensee's relationships with the performers it hires to create the content of its broadcasts are as a factual matter significantly different than those in which a third party steps into the licensee's shoes to perform requisite maintenance on broadcast equipment or similar operational duties. Moreover, the nature of a licensee's duty with respect to broadcast content implicates different legal considerations than do its duties with respect to the operation of its stations or equipment. Unlike the Commission's prior cases on the operational and managerial aspects of broadcasting, the imposition of liability for the content of programming necessarily implicates the First Amendment. For example, an unwitting broadcaster might be held liable for its independent contractor's negligence in monitoring and maintaining a tower antenna without raising a constitutional question. But the same cannot be said of imposing liability for the speech or expression of independent contractors. *Cf. McFarlane*, 74 F.3d at 1303 ("[A]ctual malice is a First Amendment protection predicated on a subjective state of mind, which surely cuts against any extension of vicarious liability beyond *respondeat superior* . . . . [W]e

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at the Plain Dealer and that Forest City Publishing Co. was therefore liable under traditional doctrines of respondeat superior." (footnote omitted)); *see also McFarlane v. Esquire Magazine*, 74 F.3d 1296, 1302 (D.C. Cir. 1996) ("The writer in question [in *Cantrell*] was an employee of the corporate defendant, and, although the trial court had given an instruction somewhat muddling the categories of employee and agent, no one had objected. So *Cantrell* presented no occasion for the Court to address the issue of when the mental state of non-employee agents may be imputed to the principal." (citations omitted)).

doubt that actual malice can be imputed except under *respondeat superior* . . . .").

2.

Broadcast licensees' duties with respect to the content of broadcast material are defined by statute under 18 U.S.C. § 1464 and by the corresponding agency rule, 47 C.F.R. § 73.3999(b). The Commission correctly asserts that a licensee may not sidestep its obligations under these provisions, including the licensee's duty to avoid the broadcast of indecent material, through routine delegation to third parties. And the Commission's practical concerns underscoring the need for strict liability are meritorious. But because these provisions sanction the content of speech or expression, the First Amendment precludes a strict liability regime for broadcast indecency. The First Amendment requires that the FCC prove scienter when it seeks to hold a broadcaster liable for indecent material. In the case of scripted or pre-recorded indecent material, the scienter element likely would be satisfied. But when the indecent material is unscripted and occurs during a live broadcast, as in the Halftime Show, a showing of scienter must be made on the evidence.

It is a well-established constitutional requirement that in the few areas where the government may lawfully enforce content-based restrictions on speech and expression, liability may not be imposed on a speaker without proof of scienter. *See, e.g., In re Grand Jury Matter, Gronowicz*, 764 F.2d 983, 988 (3d Cir. 1985) (en banc) ("In the post-publication [punishment of the dissemination of conscious falsehoods] setting, . . . accomodation to the first amendment protection of free ex-

pression is made by scienter requirements. . . ."). Non-obscene child pornography, for instance, can be restricted when adult pornography cannot because the State's compelling interest in protecting children outweighs conflicting First Amendment interests. *New York v. Ferber*, 458 U.S. 747, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982); *United States v. Cochran*, 17 F.3d 56, 58 (3d Cir. 1994). But statutes criminalizing child pornography must require proof of scienter to withstand constitutional scrutiny. *Cochran*, 17 F.3d at 58; *see Ferber*, 458 U.S. at 765, 102 S. Ct. 3348. Proof of scienter is necessary even where the prohibited category of speech or expression is unprotected by the First Amendment. In *Smith v. California*, 361 U.S. 147, 80 S. Ct. 215, 4 L. Ed. 2d 205 (1959), the Supreme Court set forth a constitutional rule that convictions under statutes prohibiting obscenity cannot be sustained without proof of the defendant's scienter. As the Court discussed in *Smith*, a contrary rule would risk chilling protected speech. *Id.* at 153-54, 80 S. Ct. 215. The rule announced in *Smith* has been reaffirmed repeatedly by the Court. *See, e.g., Osborne v. Ohio*, 495 U.S. 103, 115, 110 S. Ct. 1691, 109 L. Ed. 2d 98 (1990); *Hamling v. United States*, 418 U.S. 87, 123, 94 S. Ct. 2887, 41 L. Ed. 2d 590 (1974); *Ginsberg v. New York*, 390 U.S. 629, 644, 88 S. Ct. 1274, 20 L. Ed. 2d 195 (1968); *Mishkin v. New York*, 383 U.S. 502, 511, 86 S. Ct. 958, 16 L. Ed. 2d 56 (1966).

The FCC contends its broadcast indecency regime, as a civil enforcement mechanism, is distinguishable from *Smith*, which reviewed convictions under criminal statutes. But the Supreme Court rejected a similar argument in *Manual Enterprises, Inc. v. Day*, 370 U.S. 478, 82 S. Ct. 1432, 8 L. Ed. 2d 639 (1962). *See id.* at 492,

82 S. Ct. 1432 ("[T]his Court's ground of decision in *Smith v. California* . . . indicates that a substantial constitutional question would arise were we to construe [a statute proscribing obscene advertising] as not requiring proof of scienter in civil proceedings."); *cf. New York Times Co. v. Sullivan*, 376 U.S. 254, 277, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964) ("What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel. The fear of damage awards . . . may be markedly more inhibiting than the fear of prosecution under a criminal statute."); *Gronowicz*, 764 F.2d at 988 ("No distinction having any first amendment significance can be made between libel, civil or criminal, and fraud, civil or criminal. In both libel and fraud, post-publication sanctioning occurs because of a falsehood made with the requisite state of mind."). We agree with other courts that " 'any statute that chills the exercise of First Amendment rights must contain a knowledge element.'" *Am.-Arab Anti-Discrimination Comm. v. City of Dearborn*, 418 F.3d 600, 611 (6th Cir. 2005) (quoting *Video Software Dealers Ass'n v. Webster*, 968 F.2d 684, 690 (8th Cir. 1992)).

Moreover, indecency is protected by the First Amendment, whereas the constitutional rule of *Smith* applied to obscenity, an unprotected form of speech. If liability for obscenity may lie only where scienter is proven, then liability for higher-value speech must depend on a showing of some quantum of scienter at least as significant. The government's authority to restrict constitutionally protected speech or expression can be no greater than its authority to restrict unprotected speech or expression. *See Florida Star v. B.J.F.*, 491

U.S. 524, 539, 109 S. Ct. 2603, 105 L. Ed. 2d 443 (1989) ("Nor is there a scienter requirement of any kind under [Florida Stat.] § 794.03 [,which proscribes the dissemination through mass communication of the name of a sexual assault victim's name,] engendering the perverse result that truthful publications challenged pursuant to this cause of action are less protected by the First Amendment than even the least protected defamatory falsehoods . . . .").

Accordingly, the statutory prohibition of broadcast indecency, 18 U.S.C. § 1464, should be read to include a scienter element. Other courts have agreed. In *Tallman v. United States*, 465 F.2d 282 (7th Cir. 1972), the United States Court of Appeals for the Seventh Circuit held scienter is a necessary ingredient of an offense under 18 U.S.C. § 1464. *Id.* at 285. In a companion case, the court described its *Tallman* holding as "conclud[ing] that scienter is a pertinent and necessary element for conviction under [18 U.S.C.] § 1464 . . . ." *United States v. Smith*, 467 F.2d 1126, 1128 (7th Cir. 1972). Similarly in *Gagliardo v. United States*, 366 F.2d 720 (9th Cir. 1966), the United States Court of Appeals for the Ninth Circuit, reviewing a conviction for violating the obscenity provision of 18 U.S.C. § 1464, described the defendant's intent as a "very pertinent and necessary element" for conviction under the statute. *Id.* at 724.

Because it also grounded CBS's forfeiture liability in a violation of the indecency provisions of 47 C.F.R. § 73.3999, the agency's administrative rule on broadcast indecency, the FCC contends the scienter element requisite to 18 U.S.C. § 1464 is not necessarily an impediment here. The rule provides that "[n]o licensee of a

radio or television broadcast station shall broadcast on any day between 6 a.m. and 10 p.m. any material which is indecent." *Id.* But the title of 47 C.F.R. § 73.3999, "Enforcement of 18 U.S.C. § 1464 (restrictions on the transmission of obscene and indecent material)," seems to indicate that the rule merely enforces 18 U.S.C. § 1464 and does not serve as an independent prohibition on indecency in broadcasting.

The history of Rule 73.3999 further shows that the indecency element of the rule is identical to that of 18 U.S.C. § 1464. In 1988, Congress directed the FCC to "promulgate regulations in accordance with section 1464, title 18, United States Code, to enforce the provisions of such section on a 24 hour per day basis." An Act Making Appropriations for the Departments of Commerce, Justice, and State, Pub. L. No. 100-459, § 608, 102 Stat. 2186, 2228 (1988). On December 28, 1988, the FCC complied by adopting 47 C.F.R. § 73.3999, which provided in its entirety that "[t]he Commission will enforce the provisions of section 1464 of the United States Criminal Code, 18 U.S.C. 1464, on a twenty-four hour per day basis in accordance with Pub. L. No. 100-459." This rule was subsequently invalidated by the United States Court of Appeals for the D.C. Circuit, which rejected a 24-hour ban on indecency and mandated a safe-harbor time period during which 18 U.S.C. § 1464 would not be enforced. *See ACT I*, *supra*, 932 F.2d at 1508. The FCC then amended the rule to include a safe-harbor period, but subsequent review by the D.C. Circuit sitting en banc found the FCC's safe-harbor time period too limited. The court instructed the FCC to "limit its ban on broadcasting of indecent programs to the period from 6:00 a.m. to 10:00 p.m." *ACT II*, *supra*,

58 F.3d at 670. In response, the FCC amended 47 C.F.R. § 73.3999 to its current form. *In re Prohibitions Against Broad. Indecency in 18 U.S.C. § 1464*, 10 F.C.C.R. 10558 (1995).

Accordingly, the Commission's proffered interpretation of 47 C.F.R. § 73.3999, which appears to contradict the plain language of the regulation as well as the history of its adoption, would appear to be erroneous and inconsistent with the regulation.[31] Because Rule 73.3999 only indicates the time of day during which 18 U.S.C. § 1464 will be enforced, the FCC should establish a violation of 18 U.S.C. § 1464 in order to show a violation of Rule 73.3999. And because the indecency provision of 18 U.S.C. § 1464 should be interpreted as containing a scienter element, so too should the indecency provision of 47 C.F.R. § 73.3999.

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[31] The FCC's "interpretation of its own regulation is, of course, entitled to considerable deference." *Barnes v. Cohen*, 749 F.2d 1009, 1018 (3d Cir. 1984). But "our deference to an agency's interpretation of its own regulations is 'tempered by our duty to independently insure that the agency's interpretation comports with the language it has adopted.'" Conn. Gen. Life Ins. Co. v. Comm'r of Internal Revenue, 177 F.3d 136, 144 (3d Cir. 1999) (quoting *Dir., Office of Workers' Comp. Programs, U.S. Dep't of Labor v. Gardner*, 882 F.2d 67, 70 (3d Cir. 1989)). Accordingly, "we need not accept the agency interpretation if it is 'plainly erroneous or inconsistent with the regulation.'" *Barnes*, 749 F.2d at 1018 (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414, 65 S. Ct. 1215, 89 L. Ed. 1700 (1945)); *see also Conn. Gen. Life Ins. Co.*, 177 F.3d at 144 ("We 'must defer to the [agency's] interpretation unless an "alternative reading is compelled by the regulation's plain language or by other indications of the [agency's] intent at the time of the regulation's promulgation."' ") (quoting *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512, 114 S. Ct. 2381, 129 L. Ed. 2d 405 (1994) (quoting *Gardebring v. Jenkins*, 485 U.S. 415, 430, 108 S. Ct. 1306, 99 L. Ed. 2d 515 (1988))) (additional citation omitted) (alterations in original).

Moreover, the FCC cannot do by administrative rule that which Congress is constitutionally prohibited from doing by statute. Whether or not the indecency provision of 47 C.F.R. § 73.3999 functions independently of 18 U.S.C. § 1464, the FCC's rule risks chilling constitutionally protected speech in the same manner as the statutory provision. As a constitutional rule, *Smith* is no less relevant merely because the government acts through an executive agency in restricting the content of speech. Any government regulation penalizing the content of speech or expression should require proof of scienter as an element of liability to survive First Amendment scrutiny.

Scienter is an element in determining whether a violation of 18 U.S.C. § 1464 or 47 C.F.R. § 73.3999 occurred. A broadcast licensee should not be found liable for violating the indecency provisions of 18 U.S.C. § 1464 or 47 C.F.R. § 73.3999 without proof the licensee acted with scienter. Because the Commission's proffered "non-delegable duty" theory of CBS's vicarious liability, which functionally equates to strict liability for speech or expression of independent contractors, appears to dispense with this constitutional requirement, it should not be sustained.

C.

As an alternative to vicarious liability, the FCC found CBS directly liable for a forfeiture penalty under 47 U.S.C. § 503(b)(1)(B) for failing to take adequate precautionary measures to prevent potential indecency during the Halftime Show. *Reconsideration Order* at ¶ 17. According to the Commission, CBS deliberately ignored warnings that visual indecency might occur during the

Halftime Show. The FCC contends the risk of indecency was obvious following public comments of Jackson's choreographer, who predicted that Jackson's performance would include "some shocking moments," and concerns raised by the NFL over the Halftime Show script. The FCC asserts that CBS failed to investigate these warnings or properly act to address the risk.

This failure, the FCC contends, satisfies the willfulness element of 47 U.S.C. § 503(b)(1)(B). Under 47 U.S.C. § 503(b)(1)(B), the FCC has authority to order forfeiture penalties upon determining that a person:

> willfully or repeatedly failed to comply with any of the provisions of this chapter or of any rule, regulation, or order issued by the Commission under this chapter or under any treaty, convention, or other agreement to which the United States is a party and which is binding upon the United States.

Id. "Willful" is defined elsewhere in the Communications Act as the "conscious and deliberate commission or omission of [an] act, irrespective of any intent to violate any provision of this chapter or any rule or regulation of the Commission authorized by this chapter or by a treaty ratified by the United States." 47 U.S.C. § 312(f)(1). Applying this standard, the FCC asserts its "finding of willfulness is based on CBS's knowledge of the risks and its conscious and deliberate omissions of the acts necessary to address them." *Reconsideration Order* at ¶ 23.

1.

As an initial matter, we note the record before us is unclear on whether the agency properly applied the forfeiture statute. As described, the Commission issued its

forfeiture order under 47 U.S.C. § 503(b)(1)(B), which includes an express willfulness standard. But section 503(b)(1)(B) may not be the applicable statutory provision for forfeitures based on broadcast indecency. A separate provision of the forfeiture statute—47 U.S.C. § 503(b)(1)(D)—authorizes the Commission to issue a forfeiture penalty against any person the Commission determines "violated any provision of section . . . 1464 of Title 18." Accordingly, the forfeiture statute on its face appears to require the Commission to sanction broadcast indecency through section 503(b)(1)(D) rather than through section 503(b)(1)(B).[32] *Cf. Action for Children's Television v. FCC*, 59 F.3d 1249 (D.C. Cir. 1995) (citing 47 U.S.C. § 503(b)(1)(D) as the relevant provision authorizing the FCC to impose a civil forfeiture for a violation of the indecency provision of 18 U.S.C. § 1464).

CBS and supporting amici contend the very fact of section 503(b)(1)(D) excludes the possibility of the FCC sanctioning violations of 18 U.S.C. § 1464 through section 503(b)(1)(B), because doing so would render section 503(b)(1)(D) superfluous. While this contention is perhaps meritorious, we recognize the Commission's interpretation of the Communications Act, including the relevant forfeiture provisions of 47 U.S.C. § 503(b)(1), would be entitled to considerable deference. But we cannot resolve this dispute among the parties, because, as we

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[32] If violations of 18 U.S.C. § 1464 may not be penalized under section 503(b)(1)(B), it is uncertain whether violations of 47 C.F.R. § 73.3999 may be penalized under that section. As discussed *supra*, 47 C.F.R. § 73.3999 does no more than establish the time of day during which 18 U.S.C. § 1464 will be enforced. If Congress intended for violations of 18 U.S.C. § 1464 to be penalized under section 503(b)(1)(D), then it may have intended for "violations" of 47 C.F.R. § 73.3999 also to be penalized under that section.

will explain, the Commission's interpretation of the statutory scheme is unclear.

The FCC's initial *Forfeiture Order* and subsequent *Reconsideration Order* create some confusion. In both, the Commission frequently refers to 47 U.S.C. § 503(b) generally without specifying whether it is acting under subpart (1)(B) or subpart (1)(D). *See, e.g., Forfeiture Order* at ¶ 1 n.1 (citing section 503(b) without specification of relevant subpart); *id.* at ¶ 15 (referring to CBS's forfeiture under "section 503(b)(1) of the Act"); *Reconsideration Order* at ¶ 5 ("The Forfeiture Order also rejected CBS's claim that the violation was accidental rather than willful under section 503(b)(1) of the Act."). Moreover, the Commission repeatedly describes its orders as determinations that CBS violated the indecency provisions of both 18 U.S.C. § 1464 and 47 C.F.R. § 73.3999. *E.g., Forfeiture Order* at ¶¶ 1, 7, 36; *Reconsideration Order* at ¶ 1 & n.3. Yet the Commission appears to be penalizing these violations only under section 503(b)(1)(B), and not under section 503(b)(1)(D):

> Under section 503(b)(1)(B) of the [Communications] Act, any person who is determined by the Commission to have willfully failed to comply with any provision of the Act or any rule, regulation, or order issued by the Commission shall be liable to the United States for a monetary forfeiture penalty. . . . For the reasons set forth above, we conclude under this standard that CBS is liable for a forfeiture for its willful violation of 18 U.S.C. § 1464 and section 73.3999 of the Commission's rules.

Forfeiture Order at ¶ 36 (footnote omitted); *see also id.* at ¶ 30 n.103 ("As we find CBS legally responsible for

the indecent broadcast based on both its own willful omission and its vicarious liability for the willful acts of its agents under the principle of respondeat superior, we need not address whether it could also be held responsible under Section 503(b)(1)(D) without a showing of willfulness.").

On this record, the FCC's orders may be read as penalizing a violation of 18 U.S.C. § 1464 under section 503(b)(1)(B). Or, the FCC's orders may be understood as penalizing CBS's violation of the indecency provision of 47 C.F.R. § 73.3999 under section 503(b)(1)(B) but not penalizing CBS's violation of the indecency provision of 18 U.S.C. § 1464. Under the latter reading, the FCC's assertions that CBS violated 18 U.S.C. § 1464 would be included in the orders only for the purpose of establishing CBS's violation of Rule 73.3999, which enforces 18 U.S.C. § 1464.

Again, it is unclear whether the statutory scheme permits violations of 18 U.S.C. § 1464 to be penalized by forfeitures issued under section 503(b)(1)(B) instead of, or in addition to, section 503(b)(1)(D). And, if section 503(b)(1)(D) is implicated here, it is unclear whether the willfulness standard applies under that section. Unlike section 503(b)(1)(B), the language of section 503(b)(1)(D) does not include the term "willful."

Accordingly, further clarification from the FCC is necessary before it may be determined whether the agency correctly concluded that CBS's actions constituted a "willful" violation of the indecency provisions.

2.

The record is also unclear whether the Commission correctly determined that CBS's conduct satisfied the willfulness standard. Specifically, it is unclear whether the Commission's determination accounts for the apparent interplay between the statutory "willfulness" standard of the forfeiture statute and the constitutionally required scienter element of the indecency provisions. If the FCC based its forfeiture order in whole or in part on 47 U.S.C. § 503(b)(1)(D), and if it interpreted that section as not incorporating the willfulness standard of section 503(b)(1)(B), then the scienter element of 18 U.S.C. § 1464 would appear to set the bar for establishing that CBS acted with the requisite mental state.[33] But even if the willfulness standard is incorporated into section 503(b)(1)(D)—or if a forfeiture for broadcast indecency may issue entirely under section 503(b)(1)(B)—a showing of scienter is constitutionally required to penalize broadcast indecency. Accordingly, the willfulness standard, both as interpreted and as applied by the FCC, should set a bar at least as high as scienter. And on this record, it is not clear whether the FCC has complied with this requirement.

Forfeiture liability under 47 U.S.C. § 503(b)(1)(B) is triggered by a broadcast licensee's violation of a distinct "rule, regulation, or order of the Commission." This appears to call for a two-part inquiry: did a violation

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[33] The FCC has not yet addressed this possibility. *See Forfeiture Order* at ¶ 29 n.103 ("As we find CBS legally responsible for the indecent broadcast based on both its own willful omission and its vicarious liability for the willful acts of its agents under the principle of respondeat superior, we need not address whether it could also be held responsible under Section 503(b)(1)(D) without a showing of willfulness.").

occur; and was that violation "willful" or "repeated" for the purposes of section 503(b)(1)(B).[34] Here, the triggering violations—that is, the violations that satisfy the first part—are CBS's alleged violations of the indecency provisions of 18 U.S.C. § 1464 and 47 C.F.R. § 73.3999. Accordingly, it seems the Commission's first step should be to determine whether CBS's conduct violated the indecency provisions, including establishing scienter.

The scienter element of the indecency provisions-as a constitutional requirement—is paramount. That is, scienter is the constitutional minimum showing for penalizing the speech or expression of broadcasters—irrespective of whether the penalty is in the form of a monetary forfeiture under 47 U.S.C. § 503(b)(1) or a different punitive measure available to the FCC. But the record is unclear whether the Commission's interpretation and application of the willfulness standard account for this apparent interplay with the scienter element of the indecency provisions. Accordingly, we are unable to decide whether the Commission's determination that CBS acted "willfully" was proper in light of this scienter requirement.

Determining whether CBS acted with the requisite scienter would call for an examination of the scienter element inherent in the indecency provisions. Where a scienter element is read into statutory text, scienter would not necessarily equate to a requirement of actual knowledge or specific intent. *See Carter v. United States*, 530 U.S. 255, 269, 120 S. Ct. 2159, 147 L. Ed. 2d

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[34] If 47 U.S.C. § 503(b)(1)(D) is interpreted as incorporating the willfulness standard, its operation appears identical. Forfeiture liability under that section is triggered by a broadcast licensee's violation of 18 U.S.C. § 1464.

203 (2000) (citing *Staples v. United States*, 511 U.S. 600, 114 S. Ct. 1793, 128 L. Ed. 2d 608 (1994)). "The presumption in favor of scienter requires a court to read into a statute only that *mens rea* which is necessary to separate wrongful conduct from otherwise innocent conduct." *Id.* (citing *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72, 115 S. Ct. 464, 130 L. Ed. 2d 372 (1994)). In some circumstances, recklessness is considered a sufficiently culpable mental state for the purposes of imposing liability for an act. *E.g., Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 194, 96 S. Ct. 1375, 47 L. Ed. 2d 668 (1976) ("In certain areas of the law recklessness is considered to be a form of intentional conduct for purposes of imposing liability for some act.").

Recklessness would appear to suffice as the appropriate scienter threshold for the broadcast indecency regime. It is likely that a recklessness standard would effectively "separate wrongful conduct from otherwise innocent conduct" of broadcasters, *Carter*, 530 U.S. at 269, 120 S. Ct. 2159, without creating an end—around indecency restrictions that might be encouraged by an actual knowledge or intent standard. And a broadcast licensee's reckless disregard for the content of its programming would be likely to unreasonably create a known or obvious risk of indecent material being aired, making it highly probable that harm will follow. *See Safeco Ins. Co. of Am. v. Burr*, ____ U.S. ____, 127 S. Ct. 2201, 2215, 167 L. Ed. 2d 1045 (2007) ("While 'the term recklessness is not self-defining,' the common law has generally understood it in the sphere of civil liability as conduct violating an objective standard: action entailing 'an unjustifiably high risk of harm that is either known or so obvious that it should be known.'" (quoting *Farmer*

v. Brennan, 511 U.S. 825, 836, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994); citing Prosser and Keeton, Handbook of the Law of Torts, § 34 at 213-14)).

Also instructive here are other cases determining recklessness to be an adequate level of scienter for imposing liability in related First Amendment contexts where speech or expression is restricted based on its content. In *Osborne v. Ohio*, 495 U.S. 103, 110 S. Ct. 1691, 109 L. Ed. 2d 98 (1990), the Supreme Court addressed a criminal defendant's constitutional challenges to Ohio's prohibition against possessing and viewing child pornography. The petitioner in *Osborne* contended in part that the statute was unconstitutional because it did not expressly include a scienter element. *See id.* at 112 n.9, 110 S. Ct. 1691. But the Court rejected this argument, noting that "Ohio law provides that recklessness is the appropriate *mens rea* where a statute 'neither specifies culpability nor plainly indicates a purpose to impose strict liability.'" *Id.* (quoting Ohio Rev. Code Ann. § 2901.21(B) (1987)). The Court went on to explain:

> The Ohio Supreme Court also concluded that the State had to establish scienter in order to prove a violation of [the child pornography statute] based on the Ohio default statute specifying that recklessness applies when another statutory provision lacks an intent requirement. The [child pornography] statute on its face lacks a *mens rea* requirement, but that omission brings into play and is cured by another law that plainly satisfies the requirement laid down in *Ferber* that prohibitions on child pornography include some element of scienter.

Id. at 115 (citations omitted).

But recklessness should be the constitutional minimum. A broadcast licensee's mere negligence in airing indecent material during a restricted time slot would not satisfy the scienter element of 18 U.S.C. § 1464 or 47 U.S.C. § 73.3999. In *Manual Enterprises*, the Supreme Court read a scienter element into a federal statute prohibiting the advertisement of obscene material through the mails. 370 U.S. at 492-93, 82 S. Ct. 1432. The Court addressed the scope of this inferred scienter element, stating "it may safely be said that a federal statute which, as we construe it, required the presence of that [scienter] element is not satisfied . . . merely by showing that a [magazine publisher] defendant did not make a good faith effort to ascertain the character of his advertiser's materials." *Id.* at 493, 82 S. Ct. 1432. In the broadcast indecency context, a broadcaster might act recklessly if it fails to exercise proper control over the unscripted content of its programming. But when a broadcaster endeavors to exercise proper control, but ultimately fails, to prevent unscripted indecency, it will not have acted with scienter if its actions were negligent rather than reckless.

The airing of scripted indecency or indecent material in pre-recorded programming would likely show recklessness, or may even constitute evidence of actual knowledge or intent. But when unscripted indecent material occurs during a live or spontaneous broadcast, as it did here, the FCC should show that the broadcaster was, at minimum, reckless in causing the indecent material to be transmitted over public airwaves.[35] A broad-

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[35] The facts of *Young Broadcasting*, as alleged by the FCC in its Notice of Apparent Liability in that case, may be indicative of recklessness. There, the broadcast licensee presented inherently risky progra-

caster's failure to use available preventative technology, such as a delay mechanism, when airing live programming may, depending on the circumstances, constitute recklessness.

Here, CBS contends it took adequate measures to guard against the risk of unscripted indecency in the Halftime Show. It points to numerous script reviews and revisions on record, several wardrobe checks, and the implementation of a standard-industry-practice audio delay. CBS also notes that it engaged in extensive internal discussions and dialogue with the NFL over concerns relating to potential performers and content of the Halftime Show. CBS rejected other potentially-controversial performers who had previously engaged in offensive on-air conduct in favor of Jackson and Timberlake, with the NFL ultimately approving the selections. Timberlake in particular, CBS asserts, had on several prior occasions performed "Rock Your Body" live on national television without incident. CBS also rejects the FCC's contention that Jackson's choreographer's "shocking moments" prediction should have elicited concern about the potential for unscripted nudity, explaining that the statement was reasonably considered commonplace entertainment industry hyperbole and a veiled reference to Timberlake's surprise guest

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mming, a segment titled "Puppetry of the Penis," and invited performers on camera who it knew were nude below their overcoats and who it knew employed nudity as a central part of their act. Indeed, the performers were a source of interest for the program precisely because their act involved nudity and the graphic display of sexual organs. Moreover, the broadcast licensee's off-camera employees urged the performers to demonstrate their act—which involved manipulating their genitalia to form various objects—while the cameras were broadcasting live.

appearance. Moreover, CBS notes "it is undisputed that, after the [choreographer's "shocking moments"] quote appeared, CBS reviewed the script, issued wardrobe instructions, checked Jackson's costume, and implemented a delay to ensure adherence to CBS standards." CBS Reply Br. at 23 (emphasis omitted).

The Commission disputes the adequacy of these efforts by CBS. And the parties also dispute the availability—or lack thereof—of video delay technology at the time of the Halftime Show.[36] The FCC contends CBS should have instituted a video delay mechanism to guard against a potential act of indecency. *See, e.g., Reconsideration Order* at ¶ 22 n.71 ("Notwithstanding CBS's protestations to the contrary, delaying a live broadcast long enough to block visual indecency does not appear to pose major technical challenges to a company such as CBS."). But according to CBS, "no such technology had ever been developed, or was thought necessary, before the unprecedented halftime incident." CBS Reply Br. at 23. Instead, CBS states its implementation of a five-second audio delay was both "state of the art" and standard industry practice at the time of the Halftime Show. *See, e.g., Reconsideration Order* at ¶ 22 ("[CBS] asserts that [its use of audio but not video delay] did not reflect a 'calculated risk' but rather simply conformance with standard industry practice, and that a video delay was 'entirely unprecedented, and the technique had to be specifically engineered after the Super Bowl incident.'").

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[36] This issue appears central to a recklessness inquiry on the facts here.

The Commission has not refuted CBS's assertions. Instead, it points only to CBS's use of video delay for an awards show in the weeks following the Halftime Show. But the state of the art even shortly after the Halftime Show does not necessarily refute CBS's contention that video delay technology was newly created for the awards show as a reaction to the Halftime Show incident but otherwise unavailable prior to that time. The record at present is scant on evidence regarding the availability, history and other details of video delay technology. And the Commission cannot prevail if the issue of CBS's scienter is to be resolved only on assertions of the parties that are unsupported by evidence on record. Because the Commission carries the burden of showing scienter, it should have presented evidence to demonstrate, at a minimum, that CBS acted recklessly and not merely negligently when it failed to implement a video delay mechanism for the Halftime Show broadcast.

Accordingly, we are unable to decide whether the Commission's determination that CBS acted "willfully" was proper in light of the scienter requirement.[37]

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[37] As discussed, it is unclear whether the Commission interprets the willfulness standard, which requires a "conscious and deliberate" act or omission, as setting a lower or higher bar than scienter. We note there appears to be tension between the common understanding of the terms "conscious and deliberate"—which typically indicate a higher standard than recklessness—and the Commission's interpretation of those terms in its application of the willfulness standard of 47 § U.S.C. 503(b)(1)(B) to CBS. But because further clarification is needed on the FCC's interpretation of the text and mechanics of the forfeiture statute, we do not decide whether the Commission's interpretation of these terms, or its application of the willfulness standard, is permissible.

V.

In finding CBS liable for a forfeiture penalty, the FCC arbitrarily and capriciously departed from its prior policy excepting fleeting broadcast material from the scope of actionable indecency. Moreover, the FCC cannot impose liability on CBS for the acts of Janet Jackson and Justin Timberlake, independent contractors hired for the limited purposes of the Halftime Show, under a proper application of vicarious liability and in light of the First Amendment requirement that the content of speech or expression not be penalized absent a showing of scienter. And the FCC's interpretation and application of 47 U.S.C. § 503(b)(1) are not sufficiently clear to permit review of the agency's determination of CBS's direct liability for a forfeiture penalty based on broadcast indecency.

Further action by the Commission would be declaratory in nature, as the agency may not retroactively penalize CBS. Even so, our holding will not foreclose all of the Commission's adjudicatory options. In *Golden Globes*, for instance, the Commission set forth a new policy and proceeded with its indecency determination even though a retroactive monetary forfeiture was unavailable. *See id.* at ¶ 15 (concluding that "[b]ut for the fact that existing precedent would have permitted this broadcast, it would be appropriate to initiate a forfeiture proceeding . . ."); *see also* 33 Wright & Koch, Federal Practice and Procedure: Judicial Review § 8313(c) (2007) (suggesting that, in order to "avoid arrogating authority" for policymaking that is assigned to the agency, remand is appropriate when an agency has issued an arbitrary decision). Accordingly, we will va-

cate the orders of the FCC and remand for further proceedings consistent with this opinion.

RENDELL, Circuit Judge, concurring in part, dissenting in part.

I wholeheartedly agree with the majority's cogent reasoning and conclusion that the FCC's imposition of a fine against CBS cannot stand, because it acted arbitrarily and capriciously in doing so.

However, I disagree with our opining, in dicta, regarding the various possible levels of scienter arguably required under § 503(b)(1)(B) or (D), or 18 U.S.C. § 1464, or the Constitution. For one thing, this is dicta. For another, the FCC has conceded that the level of scienter required in order to warrant a fine is "willful," and has itself urged that the definition of "willful" is as set forth in 47 U.S.C. § 312(f)(i), meaning "conscious and deliberate commission or omission of such act." Appellee's Br. 34-38.

Were it necessary to venture more deeply into the issue of scienter, which I submit it is not, we should point out that the real dispute between the parties is as to what must have been "willful." The FCC adopted the position that the conscious and deliberate act was simply the act of broadcasting,[38] while the opposing (and, I believe, better) view is that the requisite conscious and deliberate act is the act of broadcasting the indecent

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[38] The majority points out that the FCC only "abandoned" this position—or, really, side-stepped it—in the *Reconsideration Order*, where it sought to impose the prevention of this type of broadcast as a non-delegable duty. See *Reconsideration Order* at ¶ 23.

material at issue.[39] Clearly, CBS's conduct here fails the latter test.

I also take issue with the majority's conclusion that there is a need to remand this case. We have held that the instant fine was improperly imposed. There are no further proceedings necessary.[40] Should the FCC wish to explain its change in policy, it can do so in the next case or issue a declaratory ruling. *See* 47 C.F.R. § 1.2.[41] It serves no purpose to do so in the context of this litigation. Nothing is to be gained, and CBS should not be forced to be a party to any such remand, with its attendant time and expense. Accordingly, I respectfully disagree with the disposition of this appeal and would reverse the order imposing forfeiture, without remanding the case.

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[39] Or, if an omission, as the FCC alternatively argues, the conscious and deliberate failure to prevent the broadcast of indecent material.

[40] Because we have held that the FCC changed its policy, and because the broadcast at issue predated this change, the FCC cannot, consistent with its policy, re-impose the fine after providing an explanation. *See Golden Globes*, 18 F.C.C. 19859, at ¶ 15 & n.40.

[41] The majority cites *Golden Globes* as authority for the agency's setting forth a new policy on remand, but that case did not involve a remand. Moreover, the passage from the treatise cited by the majority, 33 Wright & Koch, Federal Practice and Procedure: *Judicial Review* § 8313(c) (2007), concerns the proper disposition of a case where further proceedings are necessary for the agency to consider the matter anew and reach a well-reasoned ultimate decision. That is not the case here where the arbitrariness of the agency's decision is conclusive as to the outcome of the case.

APPENDIX B

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

File No. EB-04-IH-0011
NAL/Acct. No. 200432080212

IN THE MATTER OF COMPLAINTS AGAINST VARIOUS TELEVISION LICENSEES CONCERNING THEIR FEBRUARY 1, 2004 BROADCAST OF THE SUPER BOWL XXXVIII HALFTIME SHOW

Adopted: May 4, 2006
Released: May 31, 2006

ORDER ON RECONSIDERATION

By the Commission: Commissioner Adelstein concurring in part, dissenting in part, and issuing a statement.

I. INTRODUCTION

1. In this *Order on Reconsideration*, issued pursuant to section 405(a) of the Communications Act of 1934, as amended (the "Act"), and section 1.106(j) of the Commission's rules,[1] we deny the Petition for Reconsideration of Forfeiture Order ("Petition") filed by CBS Broadcasting

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[1] 47 U.S.C. § 405(a); 47 C.F.R. § 1.106(j).

Inc. ("CBS") in this forfeiture proceeding.[2] The CBS *Petition* seeks reconsideration of our decision to impose a forfeiture of $550,000 against CBS Corporation, as the ultimate parent company of the licensees of the television stations involved in this proceeding, for the violation of 18 U.S.C. § 1464 and the Commission's rule regulating the broadcast of indecent material.[3] We find that CBS has failed to present any argument warranting reconsideration of our *Forfeiture Order*.

II. BACKGROUND

2. This proceeding involves the broadcast of the halftime show of the National Football League's Super Bowl XXXVIII over the CBS owned-and-operated television stations in the CBS Network (the "CBS Stations") on February 1, 2004, at approximately 8:30 p.m. Eastern Standard Time.[4] Super Bowl XXXVII was the most-watched program of the 2003-2004 television season and had an average of audience of 89.8 million viewers.[5] At the end of the musical finale of the halftime show, Justin Timberlake pulled off part of Janet Jackson's bustier,

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[2] Petition for Reconsideration of Forfeiture Order by CBS, dated April 14, 2006 ("Petition").

[3] See *Complaints Against Various Television Licensees Concerning Their February 1, 2004 Broadcast of the Super Bowl XXXVIII Halftime Show*, Forfeiture Order, FCC 06-19 at 1 ¶ 1 & n.2, 2006 FCC LEXIS 1267 (rel. March 15, 2006) ("*Forfeiture Order*") (citing 18 U.S.C. § 1464 and 47 C.F.R. § 73.3999).

[4] The CBS Stations were identified in the Appendix to the *Forfeiture Order*. The *Forfeiture Order* noted that viewers in markets served by each of the CBS Stations filed complaints with the Commission concerning the February 1, 2004 broadcast of the Super Bowl XXXVIII halftime show. *See Forfeiture Order* at 1 ¶ 1, n.4 and Appendix.

[5] VNU Media and Marketing Guide for Super Bowl, (http://www.nielsenmedia.com/newsreleases/2005/2005SuperBowl.pdf).

exposing one of her breasts to the television audience. After conducting an investigation, the Commission issued a Notice of Apparent Liability (the "*NAL*") finding the ultimate parent company of the licensees of the CBS Stations[6] apparently liable for violating 18 U.S.C. § 1464 and section 73.3999, the Commission's rule regulating the broadcast of indecent material.[7] The *NAL* proposed a forfeiture in the amount of $27,500, the statutory maximum forfeiture amount, against each of the CBS Stations, for a total forfeiture amount of $550,000.[8]

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[6] The *NAL* was directed to Viacom, Inc., which was the ultimate corporate parent company of the licensees in question at that time. As of December 31, 2005, Viacom, Inc. effected a corporate reorganization in which the name of the ultimate parent company of the licensees of the CBS Stations was changed to CBS Corporation. For the sake of clarity, we generally refer to the petitioner herein as CBS and to its corporate parent company as CBS Corporation, even for periods preceding the reorganization. As part of the reorganization, certain non-broadcast businesses, including MTV Networks, were transferred to a new company named Viacom Inc. At the time of the violations, however, the CBS Stations and MTV Networks were corporate affiliates under common control.

[7] *See Complaints Against Various Television Licensees Concerning Their February 1, 2004, Broadcast of the Super Bowl XXXVIII Halftime Show*, Notice of Apparent Liability, 19 FCC Rcd 19230, n.4 (2004) ("*NAL*") (citing 18 U.S.C. § 1464 and 47 C.F.R. § 73.3999). The *NAL* found that there was no evidence that any licensee of any non-CBS-owned television station was involved in the selection, planning or approval of the apparently indecent material and that such licensees could not have reasonably anticipated that the CBS Network's production of a prestigious national event such as the Super Bowl would contain material that included the on-camera exposure of Ms. Jackson's breast. *Id.*, 19 FCC Rcd at 19240 ¶ 25. Accordingly, the *NAL* did not propose a forfeiture by any such licensee.

[8] *Id.*, 19 FCC Rcd at 19240 ¶ 24.

3. CBS submitted its *Opposition* to the *NAL* on November 5, 2004.[9] CBS argued that the material broadcast was not actionably indecent under the Commission's existing case law.[10] CBS further argued that the broadcast of Jackson's breast was accidental, and therefore not "willful" under section 503(b)(1)(B) of the Act.[11] CBS further argued that the Commission's indecency framework is unconstitutionally vague and overbroad, both on its face and as applied to the halftime show.[12]

4. In the *Forfeiture Order*, released on March 15, 2006, the Commission rejected CBS's arguments and imposed the $550,000 forfeiture proposed in the *NAL*. The *Forfeiture Order* held that, under the Commission's contextual analysis, the broadcast of the halftime show was patently offensive as measured by contemporary community standards for the broadcast medium. With respect to the first principal factor in the Commission's contextual analysis, the Commission rejected CBS's arguments relating to whether the broadcast of partial nudity was premeditated or planned by the broadcaster. Rather, the Commission held that the focus of the first factor of the analysis is whether the broadcast was graphic and explicit from the viewer's or listener's point of view. The Commission found that the video broadcast of an image of a woman's breast is graphic and explicit if it is clear and recognizable to the average viewer, as was the case here.[13] With respect to the second principal

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[9] Opposition to Notice of Apparent Liability for Forfeiture by CBS, dated November 5, 2004 ("*Opposition*").

[10] *Opposition* at 13-34.

[11] *Id.* at 35-38.

[12] *Id.* at 44-77.

[13] *Forfeitue Order* at 6-7 ¶ 11.

factor in the Commission's contextual analysis, the Commission agreed with CBS that the image in the halftime show was fleeting, but the Commission held that the brevity of the partial nudity was not dispositive.[14] The third principal factor is whether the material is pandering, titillating or shocking. The Commission clarified that the broadcaster's or performer's state of mind is not relevant here. Rather, this factor focuses on the material that was broadcast and its manner of presentation.[15] The Commission rejected CBS's claim that the segment in question merely involved an accidental, fleeting glimpse of a woman's breast. Rather, the segment was part of a halftime show that featured "performances, song lyrics, and choreography [that] discussed or simulated sexual activities."[16] These sexually suggestive performances culminated in the spectacle of Timberlake tearing off a portion of Jackson's clothing to reveal her naked breast during a highly sexualized performance while he sang "gonna have you naked by the end of this song."[17] The Commission stated: "Clearly, the nudity in this context was pandering, titillating and shocking to the viewing audience."[18] The Commission therefore held that, on balance, the graphic, explicit, pandering, titillating and shocking nature of the material outweighed its brevity in the contextual analysis.[19]

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[14] *Id.* at 7 ¶ 12.

[15] *Id.* at 7 n.44.

[16] *NAL*, 19 FCC Rcd at 19236 ¶ 14.

[17] *Forfeiture Order* at 8 ¶ 13.

[18] *Id.*

[19] *Id.* at 8 ¶ 14.

5. The *Forfeiture Order* also rejected CBS's claim that the violation was accidental rather than willful under section 503(b)(1) of the Act. The Commission dismissed CBS's attempts to define "willful" in accordance with criminal law and copyright law cases, holding that the definition of the word appearing in section 312 of the Act applies to this case.[20] Specifically, the Commission held that CBS Corporation acted willfully because it consciously and deliberately broadcast the halftime show, whether or not it intended to broadcast nudity, and because it consciously and deliberately failed to take reasonable precautions to ensure that no actionably indecent material was broadcast.[21] The Commission further held that CBS Corporation was vicariously liable under the doctrine of *respondeat superior* for the willful actions of the performers and choreographer that it selected and over whose performance it exercised extensive control.[22]

6. The *Forfeiture Order* also rejected CBS's constitutional arguments, concluding that the Commission's indecency standard has been upheld in a series of decisions and has not been invalidated by subsequent developments in the legal or technological landscape.[23] The *Forfeiture Order* further held that the upward adjustment of the forfeiture amount to the statutory maximum was supported by the factors enumerated in section 503(b)(2)(D) of the Act, particularly the circumstances involving the preparation, execution and promotion of the halftime show by CBS Corporation, the gravity of

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[20] *Id.* at 8-9 ¶ 15.

[21] *Id.* at 8-13 ¶¶ 15-22.

[22] *Id.* at 13-15 ¶¶ 23-25.

[23] *Id.* at 17-19 ¶¶ 30-35.

the violation in light of the nationwide audience for the indecent broadcast, CBS Corporation's ability to pay the forfeiture, and the need for strong financial disincentives to violate the Act and the indecency rule.[24] The *Forfeiture Order* also rejected CBS's claim that it lacked prior notice that a brief scene of partial nudity might result in a forfeiture. The Commission noted that in *Young Broadcasting*,[25] the Commission released a Notice of Apparent Liability proposing the statutory maximum forfeiture amount in a case involving a brief display of male frontal nudity shortly before the subject Super Bowl broadcast.[26]

III. DISCUSSION

7. *Indecency Analysis.* We reject CBS's contention that the Commission misapplied the test for broadcast indecency in the *Forfeiture Order*. In doing so, we note that CBS does not contest the Commission's determination that the material at issue here falls within the subject matter scope of our indecency definition because it "describe[d] or depict[ed] sexual or excretory organs or activities."[27] Rather, CBS takes issue with our conclusion that the Super Bowl halftime show was patently offensive as measured by contemporary community standards for the broadcast medium. While many of the arguments raised by CBS are repetitive of those set forth in its Opposition to the *NAL* and rejected by the

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[24] *Id.* at 15-16 ¶¶ 26-28.

[25] *Young Broadcasting of San Francisco, Inc.*, Notice of Apparent Liability for Forfeiture, 19 FCC Rcd 1751 (2004) ("*Young Broadcasting*") (response pending).

[26] *Id.* at 16-17 ¶ 29.

[27] *Forfeiture Order* at 5 ¶ 9.

Commission in the *Forfeiture Order*, we do address two new objections raised in the *Petition*.

8. First, CBS disputes the Commission's conclusion that "a video broadcast image of [Justin] Timberlake pulling off part of [Janet] Jackson's bustier and exposing her bare breast, where the image of the nude breast is clear and recognizable to the average viewer, is graphic and explicit,"[28] arguing that this conclusion is inconsistent with determinations reached by the Commission in the *Omnibus Order*.[29] No such inconsistency exists; rather, a comparison of the Super Bowl halftime show to the material addressed in the *Omnibus Order* highlights the critical importance that the Commission places on the particular content and context in evaluating indecency complaints.

9. CBS's attempt to compare Ms. Jackson's "wardrobe malfunction" to the material addressed in the *Omnibus Order* from *The Today Show* and *The Amazing Race 6* is unavailing. In both of those cases, the complained—of material did not constitute the focus of the scene in question. During *The Today Show*, a man's penis was briefly exposed at a considerable distance while he was shown being pulled from raging floodwaters in news footage. As the Commission indicated, "the overall focus of the scene [was] on the rescue attempt, not on the man's sexual organ."[30] As a result, many viewers may not have even noticed the briefly ex-

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[28] *Id.* at 6 ¶ 11.

[29] Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005, FCC 06-17, 2006 FCC LEXIS 1265, released March 15, 2006 ("*Omnibus Order*").

[30] *Omnibus Order* at ¶¶ 215.

posed penis. Similarly, during *The Amazing Race 6*, while two contestants were leaving a train in Budapest, the camera shot briefly showed the phrase "Fuck Cops!" spray-painted in small white letters on the side of a train. Again, the graffiti was in the background, did not constitute the focus of the scene, and would not likely have been noticed by the average viewer.[31] Under these circumstances, we found that the material at issue was not graphic or explicit.

10. In the Super Bowl halftime show, by contrast, the exposure of Ms. Jackson's breast was the central focus of the scene in question.[32] As we stated in the *Forfeiture Order*, "Jackson and Timberlake, as the headline performers, are in the center of the screen, and Timberlake's hand motion ripping off Jackson's bustier draws the viewer's attention to her exposed breast."[33] Furthermore, even though CBS claims that "this action occurred only after the shot moved away from a close-up to a long shot," Jackson's breast is nonetheless "readily discernable" and the natural focus of viewers' attention.[34] As Jackson and Timberlake were the headline performers on stage at that time, it would have been hard for someone looking at the television screen not to notice that he ripped off her clothing to expose her breast. We therefore reject CBS's theory that most viewers did not notice the exposure of Jackson's

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[31] *See Omnibus Order* at ¶¶ 189-92.

[32] As such, we note that the Commission's treatment of the Super Bowl halftime show is consistent with our evaluation of the brief exposure of a penis in *Young Broadcasting*.

[33] *Forfeiture Order* at 6 ¶ 11.

[34] *See id.*

breast.[35] We also reject CBS's repeated attempt to conflate the first and second factors of the Commission's contextual analysis. While we acknowledge that the exposure of Jackson's breast was relatively brief, this does not alter the fact that it was explicit.[36] For all of these reasons, we reaffirm our conclusion that the televised

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[35] In support of its claim that "the event became recognizable as nudity to most people only because they actively searched for images after the fact," CBS cites the facts that Janet Jackson was the most searched term on Google in February 2004 and that the end of the Super Bowl halftime show became the most TiVoed moment in the history of digital video recorders, *Petition* at 5, n.7. This evidence, however, does not provide support for CBS's theory. Given the widespread media coverage of the Super Bowl halftime show, it should come as no surprise that public interest in Jackson skyrocketed in the aftermath of the incident, thus causing many people to search for information about her using Google. While some of these searches may have been conducted by individuals wishing to see images from the halftime show, it is entirely speculative to suggest that many of these individuals: (1) had watched the halftime show; but (2) did not realize at the time that Jackson had exposed her breast. Similarly, the fact that the end of the Super Bowl halftime show was the most TiVoed moment in the history of digital video recorders lends no support to CBS's theory. There are many reasons why viewers might have replayed the exposure of Jackson's breast —not the least of which is that viewers clearly saw the image and were truly shocked. For CBS to suggest that the fact that the Super Bowl halftime show was the most TiVoed moment in history demonstrates that people watching the broadcast at the time were confused about what had happened has no basis in the evidence. For example, before Super Bowl XXXVIII, the most replayed moment in TiVo history had been the kiss shared by Britney Spears and Madonna during the 2003 MTV Video Music Awards, and it was not unclear at the time whether those two singers had actually kissed. *See* Ben Charny, "Janet Jackson Still Holds TiVo Title," September 29, 2004 (http://news.com.com/Janet+Jackson+still+holds+TiVo+title/2100-1041_3-5388626.html).

[36] *See Young Broadcasting.*

image of Timberlake tearing off Jackson's clothing to reveal her bare breast was explicit.[37]

11. Second, CBS maintains that the Commission misconstrued the third prong of our contextual analysis. Tellingly, CBS does not directly dispute the Commission's conclusion that the material was presented in a pandering, titillating and shocking manner. At the conclusion of a halftime show filled with sexual references, Timberlake and Jackson performed a duet of the song "Rock Your Body" in which Timberlake repeatedly grabbed Jackson, slapped her buttocks, and rubbed up against her in a manner simulating sexual activity, all the while proclaiming, among other things: "I wanna rock your body." Then, as the Commission stated in the *Forfeiture Order*, the performance "culminated in the spectacle of Timberlake ripping off a portion of Jackson's bustier and exposing her breast while he sang 'gonna have you naked by the end of this song.'"[38]

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[37] To the extent that CBS attempts to compare, for purposes of explicitness, the exposure of Jackson's breast during the Super Bowl halftime show to the brief exposure of an infant's naked buttocks on *America's Funniest Home Videos*, *see Petition* at 5, we seriously question CBS's grasp of contemporary community standards. We also note that the Commission found the footage from *America's Funniest Home Videos* "somewhat explicit" but that factor was outweighed in that case by the scene's brevity and the absence of any shocking, pandering, or titillating effect on the audience. *Omnibus Order* at ¶ 226. Moreover, CBS's comparison of the Super Bowl halftime show to the display of a "portion of the side of [a] maid's breast" in material previously considered by the Commission is obviously inapposite as far more than a portion of the side of Jackson's breast was displayed during her duet with Timberlake. *See Petition* at 3, n.3.

[38] *Forfeiture Order* at 8 ¶ 13.

12. Understandably, given these facts, CBS does not make any effort to argue that the material was not presented in a pandering, titillating, and shocking manner. Instead, CBS argues that the Commission should have examined whether CBS *intended* to pander, titillate, or shock the audience, rather than the manner in which the material was actually presented. CBS fundamentally misunderstands the contextual analysis employed by the Commission. In evaluating whether material is indecent, we examine the material itself and the manner in which it is presented, not the subjective state of mind of the broadcaster.[39] Indeed, under the test proposed by CBS, the same material presented in the same manner and context could be indecent on one occasion but not indecent on another if the broadcasters in question had differing intents in airing the material. CBS suggests no legal or public policy reason why the Commission should be compelled to undertake such a fruitless analysis.

13. In this instance, it is clear that the material was presented in a pandering, titillating, and shocking manner. In this regard, we strongly dispute CBS's assertion that the exposure of Jackson's breast was "exactly" the same as a broadcast where a woman's dress strap breaks and accidentally reveals her breast.[40] In this

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[39] Contrary to CBS's assertion, *see Petition* at 7, n. 10, the Commission in *Young Broadcasting* used the same approach that we have employed in this case. In *Young Broadcasting*, the Commission concluded that "the *manner of presentation* of the complained—of material . . . was pandering, titillating, and shocking." *Young Broadcasting*, 19 FCC Rcd at 1757 (2004) (emphasis added). Among other things, the Commission pointed to the fact that the broadcast included comments made by off-camera station employees urging performers from "Puppetry of the Penis" to conduct a nude demonstration.

[40] *See Petition* at 7.

case, at the conclusion of a highly sexualized performance in which Timberlake, among other things, rubbed up against Jackson in a manner simulating sexual intercourse and implored her to "do that ass-shakin' thing you do," Timberlake ripped off a portion of Jackson's clothing, thus exposing her breast, while singing "gonna have you naked by the end of this song." To claim that this material is no more pandering or titillating than an incident where a woman's dress strap accidentally breaks, thus revealing her breast for a second, utterly ignores the far different contexts of each situation.

14. We also once again reject CBS's general argument that the imposition of a forfeiture here "would be contrary to contemporary community standards for the broadcast medium" because "available information shows that the community at large was not upset about the Super Bowl broadcast."[41] In light of the public uproar following the Super Bowl halftime show, we believe that it is CBS, and not the Commission, that is out of touch with the standards of the American people. Moreover, while we continue to reject the use of third-party polls as determinative in our assessment of contemporary community standards for the broadcast medium and our analysis in this order does not rely upon any third-party polls, we do not accept CBS's argument that "available information shows that the community at large was not upset about the Super Bowl broadcast."[42] The polls cited by CBS do not indicate whether the Super Bowl broadcast was patently offensive under contemporary community standards for the broadcast me-

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[41] *Petition* at 9.

[42] *Petition* at 9.

dium.[43] Moreover, we note that other survey information suggests that most Americans were indeed offended

[43] The surveys cited by CBS in its *Petition* highlight the difficulties associated with relying on third-party public opinion polls in assessing whether material is patently offensive as measured by contemporary community standards for the broadcast medium. Most significantly, the questions asked by pollsters are often not aligned with the issues we must resolve in determining whether broadcast material is indecent under the statute and our rule. For example, the Kaiser Family Foundation survey cited by CBS did not ask respondents whether or not they found the broadcast of the Super Bowl halftime show finale to be offensive. Rather, they were asked about a quite different matter: how concerned they were about the effect of the "Janet Jackson incident" on their own children. Indeed, the fact that 17% of respondents answered that they were "very concerned" about the impact that the Janet Jackson Super Bowl incident had on their own children and that another 14% of respondents were "somewhat concerned" shows an astoundingly high level of concern about the impact of a single program on their own families, especially given that not all of the respondents even had children who watched the Super Bowl halftime show. Contrary to the suggestion of CBS, it certainly does not show that the community at large was "not upset about the Super Bowl broadcast." *Petition* at 9. Similarly, the Associated Press/Ipsos poll cited by CBS does not appear to have asked respondents whether or not they found the broadcast of the finale of the Super Bowl halftime show to have been offensive. Rather, the survey appears to have asked the conclusory question of whether the Timberlake/Jackson stunt was an illegal act, even though there is no evidence that poll respondents were informed before answering the question of the legal standard for broadcast indecency. *See* Poll: Janet's Revelation No Crime, February 21, 2004, www. cbsnews.conm/stories/2004/02/02/entertainment/printable597184.shtml. (We note that the poll is proprietary, and CBS does not provide any information concerning precisely what was asked to elicit the poll responses.) In sum, we view the results of polls and surveys in the indecency context with care and a measure of skepticism because survey results in this area can easily be skewed by the phraseology of the questions, and those questions are often not on point with the issues we must resolve in determining whether broadcast material is indecent under the statute and our rule.

by the Super Bowl halftime incident and did not believe that it was appropriate broadcast material.[44] Further, we note that while CBS now claims that the exposure of Jackson's breast was not patently offensive, it conceded otherwise shortly after the incident. For example, testifying before the House Energy and Commerce Committee, Viacom's President and Chief Operating Officer stated that "everyone at CBS and everyone at MTV was shocked and appalled . . . by what transpired" and maintained that the material "went far beyond what is acceptable standards for our broadcast network."[45] Similarly, at the same hearing, the Commissioner of the NFL said that he was "deeply disappointed and of-

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[44] For example, when specifically asked by survey researchers whether the $550,000 forfeiture proposed by the FCC against CBS was appropriate in this case, a majority of Americans responded either that the FCC had handled the case appropriately or that the Commission's proposed sanction was not harsh enough. *See* "Americans Geared Up for 'Ad Bowl' 2005", February 4, 2005, (http://www.comscore.com/press/release.asp?press=554) (44 percent of Americans agree that the FCC handled the Super Bowl halftime incident appropriately while another 12 percent felt that the Commission should have done more to punish CBS and the NFL). Moreover, a survey conducted by Opinion Dynamics Corporation also reveals that the majority of the American people think that CBS and MTV showed a lack of respect for the American people in airing the Super Bowl halftime show. *See* "Could Election 2004 Be as Close as 2000?" (February 5, 2004) (http://www.foxnews.com/story/0,2933,110675,00.html) (56 percent of Americans agree that CBS and MTV demonstrated a lack of respect for the American people with the Janet Jackson-Justin Timberlake halftime show during the Super Bowl).

[45] *Hearings Before the Subcommittee on Telecommunications and the Internet of the Committee on Energy and Commerce of the House of Representatives on H.R. 3717*, Serial No. 108-68 (February 11, 2004) at 37 (statement of Mel Karmazin).

fended by the inappropriate content of the show."[46] Finally, we reject CBS's argument that the Commission generally does not evaluate material using contemporary community standards for the broadcast medium. As we have stated before, "We rely on our collective experience and knowledge, developed through constant interaction with lawmakers, courts, broadcasters, public interest groups and ordinary citizens, to keep abreast of contemporary community standards for the broadcast medium."[47]

15. In sum, we reaffirm our conclusion in the *Forfeiture Order* that "the Super Bowl XXXVIII halftime show contained material that was graphic, explicit, pandering, titillating, and shocking and, in context and on balance, was patently offensive under contemporary community standards for the broadcast medium and thus indecent."[48] As we found in the *Forfeiture Order*, "[a]though the patently offensive material was brief, its brevity is outweighed in this case by the first and third factors in our contextual analysis."[49]

16. *Whether Violation Was "Willful."* Seeking to absolve itself of responsibility for the Super Bowl halftime show broadcast, CBS challenges the Commission's finding that the indecency violation was willful because of both CBS's own conduct and its vicarious liability for the willful actions of the performers under the doctrine of

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[46] *Id.* at 30 (statement of Paul Tagliabue).

[47] *Infinity Radio License, Inc.*, Memorandum Opinion and Order, 19 FCC Rcd 5022, 5026 (2004).

[48] *Forfeiture Order* at ¶ 14.

[49] *Id.*

respondeat superior. We conclude that there is no basis to reconsider our decision on either ground.

17. CBS contends that the "only question" in determining whether it is legally responsible for "willfully" violating the Act and the Commission's rules is whether it "intended for Ms. Jackson to bare her breast as part of a broadcast that CBS aired."[50] The Commission disagrees. Not only is that not the "only question," it is not the question at all. CBS acted willfully because it consciously and deliberately broadcast the halftime show and consciously and deliberately failed to take reasonable precautions to ensure that no actionably indecent material was broadcast.[51] The record shows that CBS was acutely aware of the risk of unscripted indecent material in this production, but failed to take adequate precautions that were available to it to prevent that risk from materializing.[52] Under these circumstances, the Commission was justified in finding CBS responsible for the indecent broadcast based on its conscious and deliberate omissions even if it did not intend for Ms. Jackson to bare her breast.[53]

18. While defending its "meticulous efforts to ensure the performance adhered to broadcast standards and that no unforeseen incidents or departures from script occurred,"[54] and dismissing the record evidence on which the Commission relied, CBS fails to address several important facts cited by the Commission. For ex-

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[50] *Petition* at 12.

[51] *Forfeiture Order* at 8-13 ¶¶ 15-22.

[52] *Id.*

[53] *See* 47 U.S.C. § 312(f)(1).

[54] *Petition* at 14.

ample, CBS does not explain in its *Petition* why it was not alarmed by, and did not investigate, the news item posted on MTV's website before the show in which Jackson's choreographer predicted that Jackson's performance would include some "shocking moments."[55] By CBS's own account, the management of both MTV and Viacom were aware of the claims but apparently did nothing to investigate them, preferring instead to remain in the dark based on implausible assumptions regarding their meaning.[56] We found unconvincing CBS's previous assertions that MTV management believed that the "shocking moments" quote referred to Timberlake's "surprise" appearance, and that Viacom personnel who reviewed the story dismissed it as hyperbole common in the music industry. As we explained in the *Forfeiture Order*, it seems dubious that Timberlake's appearance would be described as "shocking" when MTV included his name in the on-screen credits before the show.[57] Similarly, CBS says nothing about the fact that a question posed by another halftime performer to MTV staff about the length of the broadcast delay was recognized as having "scary" implications—presumably because it signaled that a performer might be contemplating a script departure and was wondering what he might be able to get away with.[58] And CBS does not dispute that the show's sponsor, the NFL, raised specific concerns about Timberlake's scripted line "gonna have you naked

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[55] *Forfeiture Order* at 10 ¶ 19.

[56] *See Opposition* at 7-8.

[57] *See Forfeiture Order* at 12 n.74.

[58] *Forfeiture Order* at 10 ¶ 19; Con. App. 6.

by the end of this song," which anticipated the stunt resulting in the broadcast nudity.[59]

19. CBS dismisses as irrelevant the fact that it learned the morning of the show of plans to use tearaway cheerleading outfits for dancers in another halftime performance in connection with a scripted line ("I wanna take my clothes off") that is markedly similar to Timberlake's line that immediately preceded the tearaway of Jackson's bustier (and had, incidentally, worried the NFL). CBS claims that this "reveals that, in carefully examining the costumes before the show, CBS reinforced its prohibition on reveals or other stunts that could go wrong and implicate indecency concerns."[60] But CBS does not say whether in "carefully examining the costumes before the show" it noticed that Jackson's bustier was constructed so that the cups could easily be torn away.[61] Nor does it address whether the parallel lyrics noted by the Commission ("I wanna take my clothes off"/"gonna have you naked by the end of this song") caused it any concern. In fact, CBS does not explain at all how it "reinforced its prohibition on reveals or other stunts that could go wrong and implicate indecency concerns."[62]

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[59] *Forfeiture Order* at 10 ¶ 19; Con. App. at 5.

[60] *Petition* at 15-16.

[61] *Id. See also id.* at 14 ("CBS double-checked with Ms. Jackson's staff there would be no alterations in her performance as scripted, including any involving wardrobe"). *See also* "Jackson's halftime stunt fuels indecency debate," USAToday.com, February 2, 2004, http://www.usatoday.com/sports/football/super/2004-02-02-jackson-halftime-incident_x.htm ("Close-ups of the costume, posted on the Internet, appear to reveal snaps around that part of the bustier.").

[62] *Petition* at 15-16.

20. These should have served as warnings signs of the risk of visual as well as audio departures from script, yet CBS does not explain why its "meticulous efforts" did not include further investigation or an adequate delay mechanism.[63] It also fails to explain why it did not take the simple measure at the outset of requiring that MTV's agreements with the performers obligate them to conform to the script and to CBS's broadcast standards and practices.[64]

21. Regarding the evidence that it does address, CBS complains that the Commission has taken evidence out of context or inflated its significance, but the record suggests otherwise. For example, it takes issue with the Commission's characterization that MTV was seeking to "push the envelope" in its halftime production, but counters only with the argument that MTV did not use that term to mean pushing the bounds of propriety in terms of sexually provocative content.[65] But the Commission's characterization is its own, and is well-founded based on the entirety of the record. MTV clearly intended for the show to be sexually provocative and repeatedly made decisions in an effort to push the show in that direction. Moreover, the fact that the NFL had to rein in MTV when it felt the show was heading in too risqué a direction suggests that MTV was in fact trying to push the envelope of propriety, without regard to whether MTV chose to use that term.[66]

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[63] *See* para. 22 *infra* regading CBS's decision to implement a 5-second delay.

[64] *Forfeiture Order* at ¶ 20.

[65] *See Petition* at 14-15.

[66] *See Forfeiture Order* at 10 ¶ 18. *See also* Con. App. 1, 5.

22. CBS also disputes our conclusion that it made a calculated decision to rely on a five-second audio delay even though it was aware of the risk of visual deviations from the script that could not be blocked with a five-second delay. It asserts that this did not reflect a "calculated risk" but rather simply conformance with standard industry practice, and that a video delay was "entirely unprecedented, and the technique had to be specially engineered after the Super Bowl incident."[67] It also claims that the NFL was concerned only about audio, not visual, departures from the script.[68] Contrary to CBS's contention, however, the record indicates that the NFL's expressed concerns were not limited to audio deviation,[69] and, perhaps even more importantly, that CBS/MTV understood that the risks were not limited to audio deviations as well.[70] Furthermore, if the standard industry delay practice was inadequate to alleviate the concerns under the circumstances, then CBS was obligated to do more.[71] We note that this was not a typical broadcast; it was the most-watched television program of the year and millions of families and children were expected to be in the audience.

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[67] *Petition* at 15.

[68] *Id.* at n.24.

[69] The NFL's concern about the lyrics "I am going to get you naked by the end of this song" can most reasonably be understood as a concern that the performers might act out the lyrics. There did not appear to be any particular cause for concern that the performers might insert profanity into that line any more than any other line.

[70] *See* Con. App. 5, 8.

[71] Notwithstanding CBS's protestations to the contrary, delaying a live broadcast long enough to block visual indecency does not appear to pose major technical challenges to a company such as CBS.

23. Holding CBS responsible for the indecent broadcast under these circumstances is not tantamount to imposing strict liability, as CBS contends, because the finding of willfulness is based on CBS's knowledge of the risks and its conscious and deliberate omissions of the acts necessary to address them. As we stated in the *Forfeiture Order*, this approach is consistent with the statutory definition of willfulness,[72] and it is particularly appropriate here given the nondelegable nature of broadcast licensees' responsibility for their programming.

24. We find CBS's arguments concerning our application of the doctrine of respondeat superior equally unpersuasive. CBS's assertion that the Commission applied "unusually strict rules" of vicarious liability in the Forfeiture Order is inaccurate.[73] The Commission applied traditional agency principles, which "ordinarily make principals or employers vicariously liable for acts of their agents or employees in the scope of their authority or employment."[74] Under these principles, the FCC concluded that Jackson, Timberlake and Jackson's choreographer were Viacom/CBS employees for purposes of determining whether CBS is vicariously liable for their conduct here, and that their actions were within the scope of their employment.[75] CBS's assertion that

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[72] 47 U.S.C. §§ 312(f)(1), 503(b)(1).

[73] *Petition* at 16 (internal quotes omitted).

[74] *Forfeiture Order* at 13 ¶ 23, quoting *Meyer* v. *Holley*, 537 U.S. 280, 285 (2003) (citation omitted).

[75] *Id.* at 13-15 ¶¶ 24-25. This decision was consistent with *Holley*. In that case, the Supreme Court held that, absent a statutory basis, vicarious liability could not be imposed based solely on the right to control. Rather, evidence was also needed that the employee acted in the scope

the Commission "seeks to impose nontraditional vicarious liability" appears to be founded on the three's alleged status "as independent contractors, not employees."[76] The factors on which CBS relies, however, are not strongly indicative of independent contractor status in the circumstances before us, and CBS does not dispute the Commission's finding on the decisive control factor.

25. The Commission properly treated CBS's right to control the halftime show as the most significant test of its relationship with the performers. Courts look to numerous factors in determining a hired party's status under common law agency principles.[77] "Though no single factor is dispositive, the greatest emphasis should be placed on the first factor—that is, on the extent to which the hiring party controls the manner and means by which the worker completes his or her assigned tasks."[78] In addition, the relative weight of common law

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of employment. *See Meyer v. Holley*, 537 U.S. at 286. Here, the Commission determined that the performers were both subject to CBS's control and acting in the scope of their authority.

[76] *Petition* at 17.

[77] *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-52 (1989), citing Restatement (Second) of Agency § 220(2) (1957) (Restatement).

[78] *Eisenberg v. Advance Relocation & Storage, Inc.*, 237 F.3d 111, 114 (2nd Cir. 2000) ("The first factor is entitled to this added weight because, under the common law of agency, an employer-employee relationship exists if the purported employer controls or has the right to control both the result to be accomplished and the manner and means by which the purported employee brings about that result.") (internal quotes and citations omitted). *See id.* at 114-15 (listing authorities). *See also* Restatement § 220(1) cmt. D ("control or right to control the physical conduct of the person giving service is important and in many

factors also varies according to the legal context in which the agency issue arises,[79] and the control factor is particularly important in the vicarious liability context because the root issue is where responsibility lies for preventing the risk of harm to third parties.[80]

26. CBS does not dispute the Commission's finding that the halftime show performance was subject to exacting control by Viacom/CBS. However, its suggestion that it exercised no more control than necessary "to ensure a proper result or end-product of the work"[81] belies the evidence that every aspect of the performance, including the exact time, length, location, material, set, script, staging, and wardrobe, was subject to the control of Viacom/CBS through its corporate affiliate MTV.[82] Viacom/CBS was not commissioning a sculpture for its lobby or hiring workers to install a floor covering, as were the hired parties in the cases it cites.[83] Rather, it

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situations is determinative" of whether that person is an employee or independent contractor).

[79] *See, e.g., id.* at 116.

[80] *See* Restatement § 219(1) cmt. a ("Bearing in mind the purpose for fixing the categories, it may be said that a servant is an agent standing in such close relation to the principal that it is just to make the latter respond for some of his physical acts resulting from the performance of the principal's business.").

[81] *Petition* at 17.

[82] *Forfeiture Order* at 13-14 ¶ 24. *See Lorenz Schneider Co. v. NLRB*, 517 F.2d 445, 451 (2nd Cir. 1975) ("the more detailed the supervision and the stricter the enforcement standards, the greater the likelihood of an employer-employee relationship").

[83] *See Petition* at 18, n.31 and accompanying text (relying on *Community for Creative Nonviolence v. Reid*, 490 U.S. 730, 752-53 (1989) (sculptor was an independent contractor under the work-for-hire doctrine) and *Carpet Exch. Of Denver, Inc. v. Indus. Claim Appeals Office*,

was producing the Super Bowl halftime show in order to attract a large nationwide audience to a CBS network program and promote the brand of its corporate affiliate MTV.[84] Viacom/CBS developed the creative concepts for the show, scripted every word uttered on stage, and reviewed every article of clothing worn by the performers.[85] CBS's reliance on *Community for Creative Non-Violence v. Reid* and *Chaiken v. VV Publishing Corp.* is misplaced because the extent of control exercised by the hiring parties in those cases was not remotely comparable to this situation.[86] *Reid* is also a work-for-hire copyright case in which factors related to compensation

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859 P.2d 278, 281 (Colo. App. 1993) (workers who installed floor covering purchased by company's customers were not employees for purposes of state worker's compensation law)). CBS cites the *Carpet Exch. Of Denver, Inc.* case for the proposition that "independent contractors, though 'subject to control sufficient to ensure that the end resulted contracted for is reached, are not subject to control over the[ir] means and methods." As discussed herein, however, in this case the performers were subject to extensive control over their means and methods.

[84] *See* CBS Response, App. C at Bates stamped pgs. 312, 355-57, 370.

[85] *Forfeiture Order* at 13-14 ¶ 24. *See* CBS Response, App. C. at Bates stamped pgs. 318, 452, 459-69, 518-19.

[86] *See Reid*, 490 U.S. at 753 ("Apart from the deadline for completing the sculpture, Reid had absolute freedom to decide when and how long to work."); *Chaiken v. VV Publishing Corp.*, 907 F. Supp. 689, 699 (S.D.N.Y. 1995) ("As an experienced reporter, Friedman controlled the manner in which the article was written—including the selection of a topic, research plan, and sources—without any guidance from the *Voice*. *Voice* editors reviewed the article only after Friedman completed a draft, and the editors subsequently made few substantive changes.").

and benefits are generally accorded more weight than they are entitled to in other legal contexts.[87]

27. In this context, the contractual terms related to compensation and benefits cited by CBS are not strongly indicative of independent contractor status.[88] CBS was obligated to ensure that its broadcast programming served the public interest, and was not free to confer this obligation on another by contract.[89] Likewise, CBS's contention that the performers were "highly skilled" does not meaningfully cut in its favor. Courts applying common law agency principles have not hesitated to hold entertainers and artists to be employees of the parties that hire them.[90] We recognize that some of

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[87] As the Second Circuit has explained, special consideration of such factors "may make sense in the copyright work-for-hire context because, under the copyright statute, workers and employees are free to allocate intellectual property rights by contract." *Eisenberg*, 237 F.3d at 117. If *Reid*'s weighing of factors applied in the vicarious liability context, however, firms could devise compensation packages to opt out of tort liability. *Compare id.* (declining to accord presumptive significance to benefits and tax treatment in determining whether a female warehouse worker was an employee under anti-discrimination laws; "[w]hile the rights to intellectual property can depend on contractual terms, the right to be treated in a non-discriminatory manner does not depend on the terms of any particular contract.").

[88] *Petition* at 17.

[89] *See Forfeiture Order* at ¶ 16. *Cf. Eisenberg*, 237 F.3d at 117 (placing special weight on the extent to which the hiring party controlled the "manner and means" by which the worker completes her assigned tasks, rather than benefits and tax treatment factors, in anti-discrimination context because special consideration of benefits and tax treatment factors "would allow workers and firms to use individual employment contracts to opt out of the anti-discrimination statutes.").

[90] *See Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 87 (2nd Cir. 1995) (sculptors held to be employees despite their "artistic freedom and

the common law factors are not indicative of agency. Again, however, the relative weight of common law factors varies according to the legal context in which the agency issue arises. The central issue here is the parties' relationship for the specific purpose of imposing vicarious liability for the performers' actions in that performance that were harmful to the public (rather than for copyright, workers' compensation, anti-discrimination or other purposes). In this context, the Commission properly concluded that the evidence clearly demonstrating Viacom/CBS's right to control the halftime show performance was decisive.[91]

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skill"); *Jack Hammer Assoc., Inc. v. Delmy Productions, Inc.*, 499 N.Y.S.2d 418, 419-20 (1st Dep't 1986) (actor in musical play); *Challis v. National Producing Co.*, 88 N.Y.S.2d 731 (3d Dep't 1949) (circus clown); *Berman v. Barone*, 88 N.Y.S.2d 327, 328 (3d Dep't 1949) (ballet dancer and variety artist). *See also Landman Fabrics, a div. of Blocks Fashion Fabrics, Inc.*, 160 F.3d 106, 113 (2nd Cir. 1998) (evidence would support a holding that artist who developed a fabric design was an employee in copyright context where, *inter alia*, artist was highly skilled but hiring party controlled the artist's work to the smallest detail). As the Commission noted, the contracts contain choice-of-law provisions specifying New York law. *Forfeiture Order* at 14 ¶ 25 n.87.

[91] CBS notes that Jackson's, Timberlake's, and Duldalao's contracts "were with a production company, not CBS or MTV," but fails to point out the significance of this fact. Examination of the record reflects that Jackson's and Timberlake's contracts were with "FRB Productions, Inc.," and Duldalao's contract was with "Remote Productions, Inc." Neither FRB nor Remote is identified in CBS's Response, but they appear to be creatures of MTV. MTV executives generated, reviewed, and signed the contracts on behalf of FRB and Remote. *See, e.g.*, CBS Response, App. C at Bates stamped pgs. 154-71, 257-61, 359-63, 2160-61, 2341. At least one document in the record specifies that Remote is "a wholly owned subsidiary of MTV Networks," *id.* at Bates stamped p. 2352, and another document suggests that MTV executives treated FRB as interchangeable with Remote. *See id.* at Bates stamped p. 2148.

28. CBS's assertion that the performers' actions were outside the scope of authority conferred by its agreements with them also lacks merit.[92] As the Commission explained, their conduct is fully attributable to CBS if it was "incident to the performance rather than 'an independent course of conduct intended to serve no purpose of the employer.'"[93] Here, the actions at issue were part of the performance for which Jackson and Timberlake were hired. Furthermore, examination of the record reflects that the costume reveal was intended to serve Viacom/CBS's overarching entertainment goal of providing a spectacular finale.[94] Accordingly, the Commission correctly concluded that Jackson and Timberlake were within the scope of their authority under common law agency principles.

29. *Amount of Forfeiture.* In its *Petition*, CBS asks the Commission to reduce the amount of the forfeiture imposed on it for three reasons. We find each of these arguments to be unpersuasive.

30. First, CBS maintains that "[t]o the extent that any O&O station was not the subject [of] a complaint about the halftime show, its fine should be rescinded and the total forfeiture reduced proportionately."[95] However, as we stated in the *Forfeiture Order*, "viewers in markets served by each of the CBS Stations filed complaints with the Commission concerning the February 1,

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[92] *Petition* at 19.

[93] *Forfeiture Order* at 14-15 ¶ 25, quoting Restatement (Third) of Agency § 7.07 (T.D. No.5 2004).

[94] *See Forfeiture Order* at 10 ¶¶ 18-19; CBS Response, App. B at Bates stamped pgs. 130, 135.

[95] *Petition* at 19-20.

2004 broadcast of the Super Bowl XXXVIII halftime show."[96] Accordingly, it was appropriate for the Commission to impose a forfeiture on all stations owned by CBS. To the extent that CBS is suggesting that the Commission will only impose a forfeiture in response to complaints that specifically mention a station's call letters, it misunderstands the enforcement policy announced by the Commission in the *Omnibus Order*. Under that policy, it is sufficient that viewers in markets served by each of the CBS Stations filed complaints with the Commission identifying the allegedly indecent program broadcast by the CBS Stations.

31. Second, CBS claims that the Commission has not provided a "logically consistent explanation" for why forfeitures were imposed on those stations owned by CBS but not on affiliates owned by others.[97] However, as we explained in the *Forfeiture Order*, CBS's culpability for the broadcast of indecent material in this case was far greater than that of other owners of CBS stations.[98] "CBS admits that it was closely involved in the production of the halftime show, and that its MTV affiliate produced it."[99] Under these circumstances, it was within the Commission's enforcement discretion to impose fines on the stations owned by CBS but not on affiliates owned by others. While CBS attempts to distance its wholly-owned television stations from its wholly-owned affiliate supervising the halftime production, it does not dispute that both entities were part of the same

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[96] *Forfeiture Order* at 1 ¶ 1, n.4.

[97] *Petition* at 20.

[98] *Forfeiture Order* at 15 ¶ 27.

[99] *Id.*

corporate structure, responsible to the same corporate parent.

32. Third, CBS argues that the forfeiture should be reduced because of its "long record of compliance with broadcast standards" and because it did not "intentionally flout[] FCC rules."[100] We disagree. Looking at all of the relevant factors enumerated in section 503(b)(2)(D) of the Act, we continue to believe that the maximum statutory forfeiture is warranted given the particular circumstances of this case. In particular, given CBS's size and resources, we stand by our belief that a lesser forfeiture "would not serve as a significant penalty or deterrent."[101] Indeed, we note that the amount of the forfeiture in this case is less than one-quarter of the $2.3 million that CBS charged for a single 30-second advertisement aired during its broadcast of Super Bowl XXXVIII.[102] While CBS observes that indecency findings may also have a deterrent effect because of the potential negative consequences on a company's licenses, it remains the case that monetary forfeitures are a central tool used by the Commission to ensure compliance with our rules.[103] Moreover, as we noted in the *Forfeiture Order*, the gravity of this violation is

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[100] *Petition* at 21.

[101] *Forfeiture Order* at 16 ¶ 28.

[102] "Television Keeps NFL On Top," *Fort Worth Star Telegram* at 1A (January 30, 2004) ("The cost for a 30-second advertisement is $2.3 million, or roughly the cost of a $77,000 luxury car each second.").

[103] Contrary to CBS's suggestion in its *Petition*, this does not mean, of course, that the Commission will always impose a maximum forfeiture anytime that a large company violates our rules. However, consistent with section 503(b)(2)(D) of the Act, a company's "ability to pay" is a factor that weighs in our analysis.

heightened because the indecent material was broadcast to "an enormous nationwide audience,"[104] a fact that CBS does not dispute. Indeed, the material in question was part of the most-watched program of the entire 2003-2004 television season by far,[105] and this fact heightens the gravity of the violation in this case. CBS's broadcast of Super Bowl XXXVIII was viewed by an average of 89.8 million people.[106] By contrast, the second most-watched program of the 2003-2004 television season, the series finale of *Friends*, only drew an average of 52.5 million viewers.[107] In addition, according to Nielsen Media Research, Super Bowl XXXVIII was the top-ranked program of the 2003-2004 television season among children of all age groups: 2 to 5; 6 to 11; and 12 to 17.[108] Finally, we continue to believe that the particular nature of this violation weighs in favor of the statutory maximum forfeiture. In this case, unsuspecting viewers were confronted during the Super Bowl halftime show, which was not rated as content inappropriate for children,[109] by a highly sexualized performance in which Timberlake tore off a piece of clothing to reveal Jackson's breast while singing "gonna have you naked by the end of this song." While CBS now argues that this conduct was not patently offensive, we disagree.

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[104] *Forfeiture Order* at 16 ¶ 28.

[105] *See* "Viewer Track: Top-rated programs of 2003-04" (www.tvb.org/rcentral/viewertrack/trends/top2003.asp).

[106] *See* VNU Media and Marketing Guide for Super Bowl, (http://www.nielsenmedia.com/newsreleases/2005/2005SuperBowl.pdf).

[107] *See* Joal Ryan, "52 Million Friends See Off 'Friends'" (May 7, 2004) (http://att.eonline.com/News/Items/0,1,14056,00.html).

[108] *See* Nielsen Media Research, TV National People Meter Data 9/22/2003 - 5/26/2004.

[109] Indeed, the program was not rated at all.

33. *Constitutional Issues.* We also adhere to our rejection of CBS's facial and as-applied constitutional challenges to the imposition of a forfeiture in this case.

34. The Commission's authority to enforce the statutory restrictions against the broadcast of indecent programming during times of day in which children are likely to be in the audience was upheld against constitutional challenge by the Supreme Court in *Pacifica* more than a quarter-century ago, and has been reaffirmed since then.[110] Under our standards implementing this settled precedent, as we have explained, CBS's broadcast was actionably indecent.

35. We reject CBS's contention that the *Forfeiture Order* abandons the policy of restraint upon which *Pacifica* was based.[111] The Order does no such thing. On the contrary, the Commission remains "sensitive to the impact of our decisions on speech."[112] In this case, however, CBS broadcast "the offensive spectacle of a man tearing off a woman's clothing on stage in the middle of a sexually charged performance" during the halftime show of one of the nation's most heavily-watched sporting events, to a vast nationwide audience that included numerous children.[113] As we have found, the broadcast was "planned by CBS and its affiliates under circumstances where they had the means to exercise control

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[110] *See, e.g., FCC v. Pacifica Foundation*, 438 U.S. 726, 748-51 (1978); *Action for Children's Television v. FCC*, 58 F.3d 654, 669-70 (D.C. Cir. 1995) (en banc) (*ACT III*), *cert. denied*, 516 U.S. 1043 (1996).

[111] *Petition* at 23.

[112] *Forfeiture Order* at 19 ¶ 35.

[113] *Id.* at 28.

and good reason to take precautionary measures."[114] Under the circumstances, we fail to see how the decision in *Pacifica*—or any other consideration—requires us to refrain from exercising our indecency enforcement powers to impose a forfeiture in this case.

36. We also reject CBS's argument that *Pacifica* limits the Commission's authority "to penalize isolated and fleeting transmissions of indecent material."[115] On the contrary, in upholding the Commission's power to proceed against material that involved the repeated use of expletives, the Court in *Pacifica* expressly left open the issue of whether an isolated expletive might also be held indecent, and did not even address a brief display of televised nudity.[116] In addition, the Commission has never itself held, as CBS suggests,[117] that a brief display of televised nudity could not be found actionably indecent. To the contrary, in *Young Broadcasting* (released shortly before the Super Bowl halftime show was broadcast), we made clear that a televised display of male frontal nudity, though comparably brief, constituted an apparent violation of our indecency rules.[118]

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[114] *Id.* at 19 ¶ 35.

[115] *Petition* at 23 n.42.

[116] *Pacifica*, 438 U.S. at 750; *see Golden Globes*, 19 FCC Rcd 4975, 4982 ¶ 16 (2004).

[117] *Petition* at 24.

[118] 19 FCC Rcd 1751, 1755 ¶ 12 (2004). In *WGBH Educ. Found.*, 68 FCC 2d 1250 (1978), we granted the renewal of a public television station license renewal in the face of complaints based on the station's broadcast of programs—including "Monty Python's Flying Circus"—that allegedly contained "nudity and/or sexually-oriented material." 69 FCC2d at 1250-51 ¶ 2. In holding that the complaints did not make out a case that the station's continued operation would be inconsistent with

37. Finally, we reiterate our rejection of CBS's contention that changes in law and technology have undermined *Pacifica* and its progeny.[119] CBS asserts that "*every* court decision that applies to *every* medium that allows targeted blocking of content has struck down broadcast-type indecency regulation."[120] But those same decisions recognize that there remain "special justifications" that allow for more extensive government regulation of broadcast speech.[121] Among them is that broadcasting continues to have "a uniquely pervasive presence in the lives of all Americans,"[122] a presence that is particularly evident where highly-anticipated annual national programming events—epitomized by the Super Bowl—are concerned. As for technological changes, while the V-chip provides a technological tool not available when *Pacifica* was decided, older televisions do not contain a V-chip,[123] and on newer sets the evidence shows that

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the public interest, *id.* at 1255, ¶ 13, we nowhere suggested that the televised broadcast of nudity could never be actionably indecent.

[119] *Petition* at 25.

[120] *Id.* (emphasis in original). (citing *United States v. Playboy Entmt. Group, Inc. v. FCC*, 529 U.S. 803 (2000); *Reno v. ACLU*, 521 U.S. 844 (1997); and *Denver Area Educ. Telecomms. Consortium v. FCC*, 518 U.S. 727 (1996)).

[121] *Reno*, 521 U.S. at 868. *See Playboy*, 529 U.S. at 815. *See also ACT III*, 58 F.3d at 660 (recognizing that "radio and television broadcasts may properly be subject to different—and often more restrictive—regulation than is permissible for other media under the First Amendment").

[122] *See ACT III*, 58 F.3d at 659 (quoting *Pacifica*, 438 U.S. at 748).

[123] As of January 1, 2000, all television sets manufactured in the United States or shipped in interstate commerce with a picture screen of thirteen inches or larger must be equipped with a "V-chip" system that can be programmed to block violent, sexual, or other programming that parents do not wish their children to view. *Technical Require-*

most parents are unaware of the V-chip's existence or the manner of its operation.[124] The V-chip also depends on accurate program ratings,[125] but as the Commission explained in the *Forfeiture Order*, sporting events are not included in the V-chip ratings system,[126] and neither the Super Bowl nor its halftime show were given V-chip ratings in this case. Nor does CBS provide any basis for concluding that had it rated the Super Bowl halftime show, it would have rated the show as inappropriate for children. Thus, CBS's constitutional argument based on

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ments to Enable Blocking of Video Programming Based on Program Ratings, 13 FCC Rcd 11248 (1998); 47 C.F.R. § 15.120(b). Out of a total universe of 280 million sets in U.S. households, *see* Nielsen Media Research U.S. TV Household Estimates, 2003-04, about 119 million sets in use are equipped with V-chips. Broadcasting & Cable TVFAX, *TV Watch "Exposes" V-chip Critics*, July 8, 2005, at 2.

[124] *See Forfeiture Order* at ¶ 34 n.117 (citing broadcaster's statements in 2004 that "less than 10 percent of all parents are using the V-chip and 80 percent of all parents who currently own a television set with a V-chip are not aware that they have it"). *See also Parents, Media and Public Policy: A Kaiser Family Foundation Survey* (Fall 2004), at 7 (telephone survey of 1,001 parents of children ages 2-17 showing that (1) only 15 percent of all parents have used the V-chip; (2) 26 percent of all parents have not bought a new television set since January 2000 (when the V-chip was first required in all sets); (3) 39 percent of parents have bought a new television set since January 2000, but do not think it includes a V-chip; and (4) 20 percent know they have a V-chip, but have not used it).

[125] In the Kaiser Family Foundation survey, nearly 4 in 10 parents of children aged 2-17 stated that most television programs are not rated accurately. *Id.* at 5. *See also* Parents Television Council, *The Ratings Sham: TV Executives Hiding Behind A System That Doesn't Work* (April 2005) (study of 528 hours of television programming concluding that numerous shows were inaccurately and inconsistently rated).

[126] *Implementation of Section 551 of the Telecommunications Act of 1996*, Report and Order, 13 FCC Rcd 8232, 8242-43, ¶ 21 (1998).

the availability of blocking technology is completely irrelevant to this case.

38. *Conclusion.* For all of these reasons, we deny CBS's *Petition.* Based on our careful consideration of the law and the record in this case, we continue to believe that the $550,000 forfeiture imposed on CBS here is appropriate.

IV. ORDERING CLAUSES

39. Accordingly, IT IS ORDERED, pursuant to section 405(a) of the Act, and section 1.106(j) of the Commission's rules,[127] that the Petition for Reconsideration of Forfeiture Order filed by CBS on April 14, 2006 is DENIED.

40. IT IS FURTHER ORDERED that a copy of this Order on Reconsideration be sent by Certified Mail, Return Receipt Requested, to Anne Lucey, Esq., Senior Vice President for Regulatory Policy, CBS Corporation, 1750 K Street, N.W., 6th Floor, Washington, D.C. 20005 and Robert Corn-Revere, Esq., Davis Wright Tremaine LLP, 1500 K Street, N.W., Suite 450, Washington, D.C. 20005-1272.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

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[127] 47 U.S.C. § 405(a); 47 C.F.R. § 1.106(j).

STATEMENT OF COMMISSIONER JONATHAN S. ADELSTEIN CONCURRING IN PART, DISSENTING IN PART

Re: Complaints Regarding Various Television Licensees Concerning Their February 1, 2004 Broadcast of the Super Bowl XXXVIII Halftime Show, Order on Reconsideration

The Super Bowl XXXVIII halftime show was arguably one of the most shocking incidents in the history of live broadcast television. Indeed, the Super Bowl was the most-watched program of the entire 2003-04 television season and American viewers, collectively, expressed their disappointment and disapproval. The Commission, entrusted with the responsibility to execute faithfully broadcast indecency laws, responded swiftly and appropriately.

While I agree with the ultimate outcome of today's Order on Reconsideration, I concur in part because the Commission again has not provided much-needed clarity and guidance to our decision-making process in indecency enforcement. In addition, I dissent in part because I continue to believe the Commission has erred in fining only CBS owned and operated stations, not all stations that broadcasted the indecent material.

Considering the substantial public confusion that pervades the Commission's indecency enforcement, we should, whenever possible, opt for clear statements of Commission policy. Until today, Commission policy has been to refrain from considering third-party polls or opinion surveys in assessing whether a program is indecent as measured by contemporary community stan-

dards. Regardless whether the poll or survey attempts to reflect the views of the national or local audience, the Commission simply does not consider opinion polls in indecency cases and polls are not a factor in determining the contemporary community standards. To suggest otherwise, as the instant Order does, is contrary to long standing Commission policy.[1]

I also have grave concerns with the failure of this Order to provide clear guidance on the nature of the Commission's new fine imposition policy announced in the March 15th, 2006, Omnibus TV Order. Rather than stating what the new policy is *not*, as today's Order does,[2] the Commission should state affirmatively the key features of our new "more limited approach towards the imposition of forfeiture penalties."[3] After all, it is still unclear how the Commission determines the sufficiency

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[1] While the Commission, in today's Order, maintains that it rejects the use of third-party polls as "determinative" and that it does not "rely" upon any third-party polls, we should provide clear guidance as to whether the Commission, as a matter of policy, even "considers" polls in its indecency analysis. The answer to that inquiry should be an unequivocal "no." Rather than making this point clear, the Commission engages in a gratuitous discussion about the adequacy of the polls cited by CBS. The Commission argues that the opinion polls cited by CBS were unavailing because the polls did not answer the central legal question –namely, "whether the Super Bowl broadcast was patently offensive under contemporary community standards." Order at ¶ 14. This discussion is misleading because the Commission does not consider polling data, notwithstanding the artfulness of the questions asked by pollsters.

[2] Order at ¶ 30.

[3] Complaints Regarding Various Television Programs Broadcast Between February 2, 2002 and March 8, 2005, FCC 06-17 (released March 15, 2006) (Omnibus TV Order) at ¶ 71.

of a viewer's complaint in light of this new enforcement policy.[4]

Finally, I dissented in part in our initial Super Bowl decision (the September 22nd, 2004, *Notice of Apparent Liability*),[5] and I do so again today. I continue to believe the Commission has decided erroneously to fine only CBS owned and operated stations, not all stations that broadcasted the indecent material. Notwithstanding the fact that this Commission has always purported to apply a national indecency standard on the broadcast medium, the Commission has failed to penalize the vast

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[4] In a failed attempt to address this significant concern, the instant Order states that "it is sufficient that viewers in markets served by each of the CBS Stations filed complaints with the Commission identifying the allegedly indecent program broadcast by the CBS Stations." This is a mere restatement of fact, not a policy statement of the essential components of a sufficient and adequate complaint.

In the Omnibus TV Order, the sole guidance the Commission provided was that it would propose forfeiture against only the licensee whose broadcast of the material was actually the subject of a viewer complaint. Omnibus TV Order at ¶ 71. Yet in the same order, based on a California viewer's complaint of indecent material against a local Washington, D.C. affiliate *and* the entire network, the Commission proposed forfeiture only against the local D.C. affiliate. The California viewer did not even assert that she viewed the program in Washington, D.C. Further, in the same case, it was completely unclear whether the complainant even watched the program on over-the-air broadcasting or on cable. The Commission is obligated to resolve or clarify these legitimate concerns.

[5] See Complaints Against Various Television Licensees Concerning Their February 1, 2004, Broadcast of the Super Bowl XXXVIII Halftime Show, Notice of Apparent Liability for Forfeiture, FCC 04-209 (released September 22, 2004) (Commr. Jonathan S. Adelstein, approving in part and dissenting in part).

majority of stations that actually broadcasted the offending halftime performance.

I believe now, as I believed then, that this is not the restrained enforcement policy the Supreme Court advised in *Pacifica*. Consistent with the values of First Amendment, this Commission should exercise restraint and caution in its determination of the type of expression that is indecent. But once the indecency determination is made, the Commission should apply a uniform fine imposition policy across the broadcast medium.

The Commission has an obligation to provide clarity and guidance whenever possible. Equally, the Commission is obligated to enforce a consistent fine imposition policy across the broadcast medium. Sadly, today's Order fails to meet our obligation on both counts. Accordingly, I concur in part and dissent in part to this Order on Reconsideration.

APPENDIX C

BEFORE THE
FEDERAL COMMUNICATIONS COMMMISSION
WASHINGTON, D.C. 20554

File No. EB-04-IH-0011
NAL/Acct. No. 200432080212

IN THE MATTER OF COMPLAINTS AGAINST VARIOUS TELEVISION LICENSEES CONCERNING THEIR FEBRUARY 1, 2004 BROADCAST OF THE SUPER BOWL XXXVIII HALFTIME SHOW

Adopted: Feb. 21, 2006
Released: Mar. 15, 2006

FORFEITURE ORDER

By the Commission: Chairman Martin, Commissioners Copps and Tate issuing separate statements; Commissioner Adelstein concurring and issuing a statement.

I. INTRODUCTION

1. In this *Forfeiture Order* ("*Order*"), issued pursuant to section 503(b) of the Communications Act of 1934, as amended (the "Act"), and section 1.80 of the Commission's rules,[1] we impose a monetary forfeiture in the

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[1] 47 U.S.C. § 503(b); 47 C.F.R. § 1.80.

amount of $550,000 against CBS Corporation ("CBS"), as the licensee or the ultimate parent company of the licensees of the television stations listed in the Appendix ("CBS Stations").[2] We find that CBS violated 18 U.S.C. § 1464 and the Commission's rule regulating the broadcast of indecent material[3] in its broadcast of the halftime show of the National Football League's Super Bowl XXXVIII over the CBS Stations on February 1, 2004, at approximately 8:30 p.m. Eastern Standard Time.[4]

II. BACKGROUND

2. The halftime show in question was a live broadcast of music and choreography produced by MTV Networks ("MTV"), which was then a Viacom, Inc. subsidiary. The halftime show lasted approximately fifteen

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[2] The Appendix is an updated version of Appendix A from the Notice of Apparent Liability in this proceeding. *See Complaints Against Various Television Licensees Concerning Their February 1, 2004, Broadcast of the Super Bowl XXXVIII Halftime Show*, Notice of Apparent Liability, 19 FCC Rcd 19230 (2004) (the "*NAL*"). The *NAL* was directed to Viacom, Inc., which was the ultimate corporate parent company of the licensees in question at that time. As of December 31, 2005, Viacom, Inc. effected a corporate reorganization in which the name of the ultimate parent company of the licensees of the CBS Stations was changed to CBS Corporation. Accordingly, we generally refer to the company herein as CBS even for periods preceding the reorganization. As part of the reorganization, certain non-broadcast businesses, including MTV Networks, were transferred to a new company named Viacom Inc. At the time of the violations, however, the CBS Stations and MTV Networks were corporate affiliates under common control.

[3] 47 C.F.R. § 73.3999.

[4] We note that viewers in markets served by each of the CBS Stations filed complaints with the Commission concerning the February 1, 2004 broadcast of the Super Bowl XXXVIII halftime show.

minutes and aired over the CBS Stations and other television stations affiliated with the CBS Television Network. The show received considerable notoriety due to an incident at the end of its musical finale, in which Justin Timberlake pulled off part of Janet Jackson's bustier, exposing one of her breasts to the television audience.

3. Following the Super Bowl broadcast and the receipt of complaints, the Enforcement Bureau ("Bureau") issued a letter of inquiry ("LOI") to CBS, seeking information about the halftime show, followed by a letter requesting videotapes of the complete Super Bowl programming broadcast over the CBS Television Network stations on February 1, 2004, including the halftime show (collectively, the "Broadcast Videotape").[5] In response, CBS provided a videotape of the broadcast of the halftime show to the Bureau on February 3, 2004,[6] an "interim response" to the Bureau's inquiries on February 10, 2004,[7] the Broadcast Videotape on February

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[5] *See* Letter from William D. Freedman, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, to Howard Jaeckel, Vice President and Associate General Counsel, CBS, dated February 2, 2004; Letter from William D. Freedman, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, to Robert Corn-Revere, Esquire, dated February 10, 2004.

[6] *See* Letter from Robert Corn-Revere, Esquire to William D. Freedman, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, dated February 3, 2004.

[7] Letter from Robert Corn-Revere, Esquire to William D. Freedman, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, dated February 10, 2004 (the "*CBS Interim Response*").

14, 2004,[8] and a complete response to the LOI on March 16, 2004.[9]

4. The script and Broadcast Videotape of the halftime show provided by CBS confirm that the show contained repeated sexual references, particularly in its opening and closing performances. The first song, "All For You," performed by Janet Jackson, began with the following lines, referring to a man at a party:

> All my girls at the party
> Look at that body
> Shakin' that thing
> Like I never did see

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[8] Letter from James S. Blitz, Esquire to William D. Freedman, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, dated February 14, 2004.

[9] Letter from Susanna M. Lowy, Esquire to William D. Freedman, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, dated March 16, 2004 (the "*CBS Response*"). Although many of CBS's responses to the LOI's inquiries are contained in both the *CBS Interim Response* and the *CBS Response*, for purposes of simplicity, unless otherwise noted, references herein will be to the latter. CBS requested confidential treatment of the bulk of the materials attached to its Response, including electronic mail and other documents relevant to the planning of the halftime show. We do not rule on CBS's request at this time because it is unnecessary to do so for purposes of this Order. Consistent with the request, however, we limit ourselves to describing or characterizing the substance of the materials and providing record citations herein, rather than actually quoting the materials or otherwise incorporating them into the Order. The Confidential Appendix, however, contains quotations to various documents in the record.

Got a nice package alright
Guess I'm gonna have to ride it tonight.[10]

These lyrics use slang terms to refer to a man's sexual organs and sexual intercourse and were repeated two more times during the song. Following that performance, P. Diddy and Nelly presented a medley of songs containing occasional references to sexual activities, emphasized by Nelly's crotch-grabbing gestures.[11] Then, after a medley by performer Kid Rock, Jackson reappeared for a performance of "Rhythm Nation" and then the closing song, "Rock Your Body," a duet in which she was joined by Justin Timberlake. During the finale, Timberlake urged her to allow him to "rock your body" and "just let me rock you 'til the break of day" while following her around the stage and, on several occasions, grabbing and rubbing up against her in a manner simulating sexual activity.[12] At the close of the song, while singing the lyrics, "gonna have you naked by the end of this song," Timberlake pulled off the right portion of Jackson's bustier, exposing her breast to the television audience.[13]

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[10] Broadcast Videotape. *See also CBS Response*, Ex. 9 at 7-10; www.azlyrics.com/lyrics/janetjackson/allforyou.html.

[11] These sexual references include the lyrics "I was like good gracious ass bodacious . . . I'm waiting for the right time to shoot my steam (you know)" and "[i]t's gettin' hot in here (so hot), so take off all your clothes (I am gettin' so hot)" in the Nelly song "Hot in Herre." Broadcast Videotape. *See also CBS Response*, Ex. 9 at 16, 18; www.lyricsstyle.com/n/nelly/hotinherre.html.

[12] Broadcast Videotape. *See also CBS Response*, Ex. 9 at 36-37; www.lyricsondemand.com/j/justintimberlakelyrics/rockyourbodylyrics.html.

[13] Broadcast Videotape.

5. The Commission released its *NAL* on September 22, 2004, pursuant to section 503(b) of the Act and section 1.80 of the Commission's rules, finding that CBS apparently violated the federal restrictions regarding the broadcast of indecent material.[14] We noted that our indecency analysis involves two basic determinations. The first determination is whether the material in question depicts or describes sexual or excretory organs or activities.[15] We found that the broadcast material contained, *inter alia*, a performance by Jackson and Timberlake that culminated in the on-camera exposure of one of Jackson's breasts, thereby meeting the first standard.[16] The second determination is whether the material is patently offensive as measured by contemporary community standards for the broadcast medium.[17] We observed that, in our assessment of whether broadcast material is patently offensive, "the *full context* in which

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[14] *See* 18 U.S.C. § 1464; 47 C.F.R. § 73.3999 ; and 47 U.S.C. § 503(b).

[15] *See Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency*, Policy Statement, 16 FCC Rcd 7999, 8002, ¶ 7 (2001) *("Indecency Policy Statement")*.

[16] *NAL*, 19 FCC Rcd at 19235, ¶ 11.

[17] The "contemporary standards for the broadcast medium" criterion is that of an average broadcast listener and does not encompass any particular geographic area. *Indecency Policy Statement*, 16 FCC Rcd at 8002, ¶ 8 and n.15. CBS suggests that we should rely on third-party public opinion polls to determine whether the material is patently offensive as measured by contemporary community standards for the broadcast medium. *Opposition* at 33-34. In determining whether material is patently offensive, we do not rely on polls, but instead apply the three-pronged contextual analysis described in the text. CBS provides no legal support for a departure from that approach.

the material appeared is critically important."[18] Three principal factors are significant to this contextual analysis: (1) the explicitness or graphic nature of the description or depiction of sexual or excretory organs or activities; (2) whether the material dwells on or repeats at length descriptions or depictions of sexual or excretory organs or activities; and (3) whether the material appears to pander or is used to titillate or shock.[19] In examining these three factors, we stated that we must weigh and balance them on a case-by-case basis to determine whether the broadcast material is patently offensive because "[e]ach indecency case presents its own particular mix of these, and possibly, other factors."[20] We noted that, in particular cases, one or two factors may outweigh the others, either rendering the broadcast material patently offensive and consequently indecent[21] or, alternatively, removing the broadcast from the realm of indecency.[22]

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[18] NAL, 19 FCC Rcd at 19235, ¶ 12, *quoting Indecency Policy Statement*, 16 FCC Rcd at 8002, ¶ 9 (emphasis in original).

[19] *Indecency Policy Statement*, 16 FCC Rcd at 8002-15, ¶¶ 8-23.

[20] *NAL*, 19 FCC Rcd at 19235, ¶ 12, *quoting Indecency Policy Statement*, 16 FCC Rcd at 8003, ¶ 10 .

[21] *NAL*, 19 FCC Rcd at 19235, ¶ 12; *Indecency Policy Statement*, 16 FCC Rcd at 8009, ¶ 19 (citing *Tempe Radio, Inc. (KUPD-FM)*, 12 FCC Rcd 21828 (Mass Media Bur. 1997) (forfeiture paid), and *EZ New Orleans, Inc. (WEZB(FM))*, 12 FCC Rcd 4147 (Mass Media Bur. 1997) (forfeiture paid), which found that the extremely graphic or explicit nature of references to sex with children outweighed the fleeting nature of the references.

[22] *NAL*, 19 FCC Rcd at 19235, ¶ 12; *Indecency Policy Statement*, 16 FCC Rcd at 8010, ¶ 20 (noting that "the manner and purpose of a presentation may well preclude an indecency determination even

6. The Commission examined all three factors in the NAL and determined that, in context and on balance, the halftime show is patently offensive as measured by contemporary community standards for the broadcast medium. The Commission determined that the broadcast of partial nudity in this instance was explicit and graphic and appeared to pander to, titillate and shock the viewing audience. Therefore, the Commission determined that the material was patently offensive as measured by contemporary community standards for the broadcast medium, even though the nudity was brief.[23]

7. The Commission concluded, based upon its review of the facts and circumstances of this case, that CBS was apparently liable for a monetary forfeiture in the amount of $550,000, calculated by applying the maximum forfeiture of $27,500 to each CBS Station, for broadcasting indecent material in apparent violation of 18 U.S.C. § 1464 and section 73.3999 of the Commission's rules.[24] In contrast, the Commission proposed no forfeiture against any licensee other than CBS. It did so based on its finding that no licensee of a non-CBS-owned CBS affiliate was involved in the selection, planning or approval of the material for the halftime show, nor could

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though other factors, such as explicitness, might weigh in favor of an indecency finding.")

[23] *NAL*, 19 FCC Rcd at 19235-36, ¶¶ 12-14.

[24] *Id.* at 19236-40, ¶¶ 16-24. The Commission recently amended its rules to increase the maximum penalties to account for inflation since the last adjustment of the penalty rates. However, the new rates apply to violations that occur or continue after September 7, 2004, and therefore do not apply here. *See Amendment of Section 1.80(b) of the Commission's Rules, Adjustment of Forfeiture Maxima to Reflect Inflation*, Order, 19 FCC Rcd 10945, 10946, ¶ 6 (2004).

any such licensee reasonably have anticipated that Viacom's production of the show would contain indecent material.[25] On November 5, 2004, CBS submitted its *Opposition* to the *NAL*.[26]

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[25] *Id.*, 19 FCC Rcd at 19240-41, ¶ 25.

[26] "*Opposition to Notice of Apparent Liability for Forfeiture*" by CBS, dated November 5, 2004 ("*Opposition*"). In addition to CBS's Opposition, we also received filings from non-parties to this proceeding that we are treating as filings by amici curiae. One such filing is a "*Petition for Partial Reconsideration of Notice of Apparent Liability for Forfeiture*" submitted by Saga Quad States Communications, LLC, and Saga Broadcasting, LLC, which argues that the *NAL* improperly imposes a new requirement on network affiliate stations to employ delay technology to prescreen network feeds. The *NAL* urges such licensees to take reasonable precautions to prevent the broadcast of indecent programing over their stations, but this is not a new requirement. *See NAL*, 19 FCC Rcd at 19241, ¶ 25. See also *Complaints Against Various Licensees Regarding Their Broadcast of the Fox Network Program "Married by America"* on April 7, 2003, *Notice of Apparent Liability for Forfeiture*, 19 FCC Rcd 20191 (2004) ("*Married by America*") (response pending); 47 C.F.R. § 73.658(e)(1) (prohibiting television stations from entering into arrangements with networks that restrict their right to reject programming that the stations reasonably believe to be unsatisfactory or unsuitable or contrary to the public interest). Another such filing by Litigation Recovery Trust ("LRT") is styled a "Petition for Reconsideration" but fails to meet the requirements of Section 1.106(b)(1) of our rules for petitions for reconsideration by non-parties. First, a petition for reconsideration of a Notice of Apparent Liability is not appropriate under Section 1.106(b)(1) because such action is only a notice, not a Commission decision that is subject to reconsideration. Furthermore, even if a petition for reconsideration were appropriate here, LRT does not make the showings required under that rule that a non-party "state with particularity the manner in which the person's interest are adversely affected by the action taken, and show good reason why it was not possible for him to participate in the earlier stages of the proceeding." 47 C.F.R. § 1.106(b)(1). In substance, LRT's filing is a supplement to a prior request for rulemaking

8. CBS does not dispute that the halftime show included a segment in which Justin Timberlake pulls off a portion of Jackson's bustier to reveal her breast at the end of the performance of a song containing the lyrics quoted above.[27] CBS nonetheless argues that the material broadcast was not actionably indecent.[28] CBS also maintains that the broadcast of Jackson's breast was accidental, and therefore was not "willful" under section 503(b)(1)(B) of the Act.[29] CBS further argues that the Commission's indecency framework is unconstitutionally vague and overbroad, both on its face and as applied to the halftime show.[30] As discussed below, we reject CBS's arguments and find the broadcast indecent for the reasons set forth herein. We reject CBS's assertion that the material at issue is not indecent because it is not patently offensive. In addition, we reject CBS's interpretation of the term "willful" and also address specific circumstances indicating that: (1) CBS consciously

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on a matter that is outside the scope of, and is not affected by, this decision.

[27] *Opposition* at 11. CBS does take issue with the *NAL*'s statement that the nudity lasted for 19/32 of a second, stating that the actual time was 9/16 of a second. *Id.* at 11 n.7. We accept CBS's determination as to the duration, but we find no practical difference here. We also note that the brevity of the image is considered in connection with just one of three contextual factors, and no single factor is dispositive. *See Indecency Policy Statement*, 16 FCC Rcd at 8003, ¶ 10 ("Each indecency case presents its own particular mix of these [three], and pos-sibly other, factors, which must be balanced to ultimately determine whether the material is patently offensive and therefore indecent. No single factor generally provides the basis for an indecency finding.").

[28] *Opposition* at 13-34.

[29] *Id.* at 35-38.

[30] *Id.* at 44-77.

omitted the actions necessary to ensure that actionably indecent material would not be aired; and (2) the performers' willful actions here were attributable to CBS under established principles of agency and respondeat superior. Finally, we reject CBS's constitutional arguments, as the courts have repeatedly upheld the constitutionality of the Commission's indecency framework and our analysis of the halftime show is consistent with that framework. We therefore conclude that the broadcast of this material by the Viacom Stations violated 18 U.S.C. § 1464 and our rule against indecent broadcasts between 6 a.m. and 10 p.m., and that the maximum statutory forfeiture is warranted.

9. *Indecency Analysis.* The indecency analysis undertaken in the *NAL* followed the approach that the Commission has consistently applied. First, the material alleged to be indecent must fall within the subject matter scope of our indecency definition, *i.e.*, "the material must describe or depict sexual or excretory organs or activities."[31] The *NAL* properly concluded that the broadcast of an exposed female breast met this definition.[32] The halftime show broadcast therefore warrants further scrutiny to determine whether or not it was patently offensive as measured by contemporary community standards for the broadcast medium.

10. As discussed above, in our assessment of whether broadcast material is patently offensive, "the *full context* in which the material appeared is critically impor-

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[31] *Indecency Policy Statement*, 16 FCC Rcd at 8002, ¶ 7.

[32] *NAL*, 19 FCC Rcd at 19235, ¶ 11.

tant."[33] In cases involving televised nudity, the contextual analysis necessarily involves an assessment of the entire segment or program, and not just the particular scene in which the nudity occurs.[34] Accordingly, in this case, our contextual analysis considers the entire halftime show, not just the final segment during which Jackson's breast is uncovered. We find that, in context and on balance, the complained-of material is patently offensive as measured by contemporary community standards for the broadcast medium.

11. Turning to the first principal factor of our contextual analysis, we conclude that a video broadcast image of Timberlake pulling off part of Jackson's bustier and exposing her bare breast, where the image of the nude breast is clear and recognizable to the average viewer, is graphic and explicit.[35] CBS maintains that none of the cases cited in the *NAL* to support the conclusion that the partial nudity in the halftime show was explicit and

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[33] *Indecency Policy Statement*, 16 FCC Rcd at 8002, ¶ 9 (emphasis in original).

[34] *See, e.g., Young Broadcasting of San Francisco, Inc.*, Notice of Apparent Liability for Forfeiture, 19 FCC Rcd 1751, 1755-57 (2004) ("*Young Broadcasting*") (response pending) (Commission makes an assessment of the entire segment of a morning news program involving an interview of and demonstration by cast members from a "Puppetry of the Penis" stage production in which adult male nudity was aired for less than a second (¶¶ 11-13); and distinguishes an earlier case involving non-fleeting adult frontal nudity in a broadcast of *Schindler's List* based on "the full context of its presentation, including the subject matter of the film [World War II and wartime atrocities], the manner of presentation, and the warnings that accompanied the broadcast of the film" (¶ 14)).

[35] We note that, although Jackson wore a piece of jewelry on her nipple, it only partially covered her nipple and did not cover her breast.

graphic involved a televised broadcast of a woman's breast.[36] We reject CBS's argument that our conclusion regarding this factor is flawed. The *NAL* correctly relied on *Young Broadcasting*, which supports the proposition that a scene showing nude sexual organs is graphic and explicit if the nudity is readily discernible.[37] In this case, although the camera shot is not a close-up, the nudity is readily discernible. Furthermore, Jackson and Timberlake, as the headline performers, are in the center of the screen, and Timberlake's hand motion ripping off Jackson's bustier draws the viewer's attention to her exposed breast. CBS suggests that the fact that this nudity was not "planned and approved by [CBS]" is somehow relevant to whether it is explicit and graphic in nature.[38] However, CBS's suggestion that planning or premeditation should be a factor in deciding whether a televised image is explicit or graphic lacks any basis in

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[36] *Opposition* at 21.

[37] *NAL*, 19 FCC Rcd at 19235, ¶ 13 and n.42. CBS attempts to distinguish *Young Broadcasting* from this case. *See Opposition* at 19-20. However, CBS's analysis focuses on the foreseeability of the nudity in that case as compared to this case. As discussed below, foreseeability and premeditation relate to whether the broadcast of indecent matter was willful, and not to whether the material is graphic and explicit.

[38] *See Opposition* at 25 n.35. *See also id.* at 22. We agree that the exposure of Jackson's breast was not in the official script submitted by CBS, but CBS has not shown that it was unplanned. Clearly, the "costume reveal" that led to the exposure of the breast was at least planned by the performers (Jackson and Timberlake) and their choreographer, Gil Duldulao, who were hired by CBS for the halftime show. Timberlake's Declaration disavows any knowledge on his part that the costume reveal would lead to exposure of Jackson's breast, but Jackson's statement does not address her knowledge or intentions, and Duldulao did not provide a statement. *See CBS Response*, Ex. 7 and Ex. 8.

logic or law.[39] Rather, the first factor in our contextual analysis focuses on the explicitness of the broadcast from the viewer's or listener's standpoint. Notwithstanding CBS's claimed befuddlement at how the televised image of a man tearing off a woman's clothing to reveal her bare breast could be deemed explicit, we believe that conclusion is clearly warranted by the facts here and fully consistent with the case law.[40]

12. The second principal factor in our contextual analysis is whether the material dwells on or repeats at length descriptions or depictions of sexual or excretory organs or activities. The *NAL* appropriately recognizes that the image of Jackson's uncovered breast during the

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[39] CBS compares this case to a decision that it claims involves programming that is "considerably more explicit and clearly premeditated," in which the Commission imposed a base forfeiture rather than the maximum forfeiture imposed in this case. *See Opposition* at 22-23, citing *Married by America*. The appropriate level of the forfeiture is best addressed in a subsequent section, but at this point we note that the case cited involved a program in which certain body parts were digitally obscured by pixilation to avoid a display of partial nudity such as that aired by CBS to a national audience in this case. Thus, that case is not a particularly useful precedent in determining whether the material at issue here is graphic and explicit.

[40] CBS argues that our recent dismissals of complaints about programming that we found not to be graphic or explicit requires a similar decision here. *Opposition* at 2[illegible] citing *KSAZ Licensee, Inc.*, Memorandum Opinion and Order, 19 FCC Rcd 15999 (2004), and *Complaints Against Various Broadcast Licensees Regarding Their Airing of the UPN Network Program "Buffy the Vampire Slayer" on November 20, 2001*, Memorandum Opinion and Order, 19 FCC Rcd 15995 (2004). Neither case is apposite here because neither program included nudity. The other cases cited by CBS are inapposite for the same reason. *See Opposition* at 23-24.

halftime show is fleeting.[41] However, "even relatively fleeting references may be found indecent where other factors contribute to a finding of patent offensiveness."[42] In this case, even though we find that the partial nudity was fleeting, the brevity of the partial nudity is outweighed by the first and third factors of our contextual analysis.

13. Under the third principal factor of our analysis—whether the material appears to pander or is titillating or shocking—we examine how the material is presented in context.[43] The *NAL* found that "the manner of presentation of the complained-of material over each [CBS Station], for which Viacom failed to take adequate precautions, was pandering, titillating and shocking."[44] The *NAL* noted that the exposure of Jackson's breast followed "performances, song lyrics and choreography

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[41] *See NAL*, 19 FCC Rcd at 19236, ¶ 14.

[42] *Indecency Policy Statement*, 16 FCC Rcd at 8009, ¶ 19. *See also Young Broafcasting; Tempe Radio*, Notice of Apparent Liability, 12 FCC Rcd 21828 (Mass Media Bur. 1997) (paid); *LBJS Broadcasting*, Notice of Apparent Liability, 13 FCC Rcd. 20956 (Mass Media Bur. 1998) (paid).

[43] *Indecency Policy Statement*, 16 FCC Rcd at 8010, ¶20.

[44] *NAL*, 19 FCC Rcd at 19236 n.44. The *NAL* stated that "the nudity here was designed to pander to, titillate and shock the viewing audience." *Id.* at ¶ 14. To the extent that the language in the *NAL* could be interpreted to suggest that the broadcaster's state of mind is a decisional factor, we wish to clarify that this is not the case. Our *Indecency Policy Statement* frames this factor as "*whether the material appears to pander or is used to titillate*, or *whether the material appears to have been presented for its shock value.*" *Indecency Policy Statement*, 19 FCC Rcd at 8003, ¶ 10 (emphasis in original). In making this determination, we focus on the material that was broadcast and its manner of presentation, not on the state of mind of the broadcaster or performer. *See Young Broadcasting*, 19 FCC Rcd at 1755-57, ¶¶ 13-14.

[that] discussed or simulated sexual activities."[45] Jackson's opening song contained repeated references to a man's "nice package" that she was "gonna have to ride . . . tonight"—slang references to male sexual organs and sexual intercourse. The P. Diddy/Nelly performance also contained sexual references, emphasized by Nelly's crotch-grabbing gestures. Likewise, the duet by Jackson and Timberlake of "Rock Your Body" contained repeated references to sexual activities[46] and choreography in which Timberlake grabbed Jackson, slapped her buttocks, and rubbed up against her in a manner simulating sexual activity. These sexually suggestive performances culminated in the spectacle of Timberlake ripping off a portion of Jackson's bustier and exposing her breast while he sang "gonna have you naked by the end of this song." Clearly, the nudity in this context was pandering, titillating and shocking to the viewing audience, particularly during a prime time broadcast of a sporting event that was marketed as family entertainment and contained no warning that it would include nudity.[47] Contrary to CBS's contention, we do evaluate the nudity in context. The offensive segment in question did not merely show a fleeting glimpse of a woman's breast, as CBS presents it. Rather, it showed a man tearing off a portion of a woman's clothing to reveal her

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[45] *NAL*, 19 FCC Rcd at 19236, ¶ 14.

[46] Timberlake sang the lyrics: "I've been watching you, I like the way you move, so go 'head and girl just do that ass-shakin' thing you do . . . I wanna rock your body, let me rock your body." Broadcast Videotape. *See also CBS Response*, Ex. 9 at 36-37; http://www.lyricsondemand.com/j/justintimberlakelyrics/rockyourbodylyrics.html.

[47] Indeed, CBS appears to concede that it was shocking, but maintains that "the 'costume reveal' was as much a shock to Viacom as to everyone else." *Opposition* at iii.

naked breast during a highly sexualized performance and while he sang "gonna have you naked by the end of this song." From the viewer's standpoint, this nudity hardly seems "accidental," nor was it.[48] This broadcast thus presents a much different case than would, for example, a broadcast in which a woman's dress strap breaks, accidentally revealing her breast for a fraction of a second.

14. Accordingly, we conclude that the Super Bowl XXXVIII halftime show contained material that was graphic, explicit, pandering, titillating and shocking and, in context and on balance, was patently offensive under contemporary community standards for the broadcast medium and thus indecent. Although the patently offensive material was brief, its brevity is outweighed in this case by the first and third factors in our contextual analysis. The complained-of material was broadcast within the 6 a.m. to 10 p.m. time frame relevant to an indecency determination under Section 73.3999 of the Commission's rules,[49] and is therefore legally actionable.

15. *Whether Violation was "Willful."* CBS argues that, if it did air indecent programming, its violation was "accidental" rather than "willful" and therefore cannot be sanctioned under section 503(b)(1) of the Act. In support of this argument, CBS cites definitions of "willful" from criminal and copyright law cases.[50] These defini-

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[48] *See CBS Response* at Ex. 7 and Ex. 8. Whether this nudity was planned or foreseeable by CBS and the stations that broadcast it is a distinct issue that is addressed below in the discussion of the "willfulness" factor.

[49] 47 C.F.R. § 73.3999.

[50] *See Opposition* at 37-38.

tions, however, are inapposite. Rather than borrowing definitions from unrelated areas of law, the Commission appropriately applies the definition of "willful" that appears in the Communications Act. Section 312(f)(1) of the Act defines "willful" as "the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate" the law.[51] As discussed in detail below, CBS acted willfully because it consciously and deliber-

[51] The Conference Report to the 1982 amendment to the Act that added this definition stated: "Willful means that the licensee knew he was doing the act in question, regardless of whether there was an intent to violate the law." H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982). The Conference Report also makes it clear that this definition applies to section 503(b) of the Act as well as section 312. *See Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991). CBS initially acknowledges that "the Commission has held that in order to satisfy the willfulness requirement, the purported offender need not intend to violate the Act or an FCC rule, or even be aware the action in question constitutes a violation." *Opposition* at 36. Yet on the next page of its Opposition it urges us to apply criminal cases in which the scienter requirement has been held to require "an act done with a bad purpose" or an "evil motive." *Id.* at 37. Clearly, those cases have no application in interpreting the willfulness requirement in a regulatory statute authorizing the imposition of administrative sanctions. We disagree with CBS's contention that criminal law definitions of "willful" are apt because 18 U.S.C. § 1464 is a criminal statute. *Id.* In *Pacifica*, the Supreme Court declined to consider questions relating to possible application of section 1464 as a criminal statute in upholding a broadcast indecency forfeiture imposed by the Commission. *FCC v. Pacifica Foundation*, 438 U.S. 726, 739 n.13 (1978) ("the validity of the civil sanctions [authorized under the Act] is not linked to the validity of the criminal penalty."). Likewise, we reject CBS's suggestion that the First Amendment requires statutes imposing civil penalties on speech to be interpreted to include the same scienter requirement as those imposing criminal penalties. *Opposition* at 38, citing *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 77-78 (1994), *Smith v. California*, 361 U.S. 147 (1959), and *United States v. Reilly*, 2002 WL 31307170 (S.D.N.Y. 2002).

ately broadcast the halftime show, whether or not it intended to broadcast nudity, and because it consciously and deliberately failed to take reasonable precautions to ensure that no actionably indecent material was broadcast.[52] CBS also is vicariously liable for the willful actions of the performers under the doctrine of respondeat superior.

16. The Commission's forfeiture authority was enacted "to impel broadcast licensees to become familiar with the terms of their licenses and the applicable Rules, and to adopt procedures, including periodic review of operations, which will insure that stations are operated in substantial compliance with their licenses and the Commission's Rules."[53] The obligation of licensees to

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[52] We note that application of this standard to CBS does not "impose a strict liability requirement on protected speech." *Opposition* at 38, *citing Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). The Supreme Court held in *Gertz* that "the States should retain substantial latitude in their efforts to enforce a legal remedy for defamatory falsehood injurious to the reputation of a private individual," so long as they do not impose liability without fault. *Id.* at 345-46. As discussed *infra*, CBS clearly is at fault for broadcasting actionably indecent material during the Super Bowl telecast. We also note that CBS's reliance on *Saxe v. State College*, 240 F.3d 200, 206 (3d Cir. 2001), as holding that willful indifference is a legally insufficient basis for punishing speech, is misplaced. *See Opposition* at 38. *Saxe* held that a school district policy prohibiting "harassing" speech was unconstitutionally overbroad because it was not limited to vulgar or lewd speech or school-sponsored speech, and was not necessary to prevent substantial disruption or interference with the rights of students or the conduct of the school. The court did not address the intent required to impose liability for expressive speech or conduct under the First Amendment.

[53] *Crowell-Collier Broadcasting Corp.*, Memorandum Opinion and Order, 44 FCC 2444, 2449 (1961) (violation due to erroneous advice from the station's competent engineering consultant warrants a forfeiture).

adopt measures to ensure compliance with the Act and the Commission's rules has particular force when it comes to broadcasters' responsibility for the programming that they broadcast to the public. Under well-established principles of broadcast regulation, "[b]roadcast licensees must assume responsibility for all material which is broadcast through their facilities," and that "duty is personal to the licensee and may not be delegated."[54]

17. CBS claims that it had no advance knowledge that Timberlake planned to tear off part of Jackson's clothing to reveal her breast. Even assuming that this claim is true, however, we do not believe that this relieves CBS from responsibility for the indecent material that it broadcast. Rather, the record reveals that CBS was acutely aware of the risk of unscripted indecent material in this production, but failed to take adequate precautions that were available to it to prevent that risk from materializing.

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[54] *Report and Statement of Policy re: Commission en banc Programming Inquiry*, 44 FCC Rcd 2303, 2313 (1960). *See also Yale Broadcasting Co. v. FCC*, 478 F.2d 594 (D.C. Cir.), *cert. denied*, 414 U.S. 914 (1973) (affirmed action of Commission reminding broadcast licensees of their duty to have knowledge of the content of their programming and on the basis of this knowledge to evaluate the desirability of broadcasting music dealing with drug use); *Gaffney Broadcasting, Inc.*, 23 2d 912, 913 (1970) ("licensees are responsible for the selec-tion and presentation of program material over their stations, including . . . acts or omissions of their employees"); *Alabama Educational Television Commission*, 50 FCC 2d 461, 464 (1975) (AETC lost its license in part because it failed to maintain exclusive authority over all of its programming decisions); *WCHS-AM-TV Corp.*, 8 FCC 2d 608, 609 (1967) (maintenance of control over programming is a most fundamental obligation of the licensee).

18. It is disingenuous for CBS to argue that "the 'costume reveal' was as much a shock to Viacom as to everyone else."[55] CBS clearly recognized that the live broadcast of the Super Bowl halftime show posed a significant risk that indecent material would be aired. The extensive planning and preparation for the show highlighted this risk. CBS knew that MTV, the corporate affiliate that was producing the show, was seeking to push the envelope by, among other things, including sexually provocative performers and material.[56] In fact, the NFL expressed concerns about whether the planned halftime show might be heading in too risqué a direction and rebuffed MTV's desire to feature one performer because of a prior incident in which the performer unexpectedly removed her clothes during a national telecast of an NFL event.[57] MTV sought to overcome the NFL's objections to another performer by offering assurances that it would exercise control over her wardrobe and actions, despite its own doubts about its ability to do so.[58]

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[55] *Opposition at* iii.

[56] *See, e.g., CBS Response*, App. B-C at Bates stamped pgs. 18, 176, 219, 314, 1175, 1229, 1456. *See also Super Bowl NAL*, 19 FCC Rcd at 19238-39 ¶ 19 (discussing MTV's promotion of the sexually-provocative nature of the halftime show by, *inter alia*, posting on its website a news item entitled "Janet Jackson's Super Bowl Show Promises 'Shocking Moments,'" which quoted her choreographer Gil Dulduleo's prediction that her performance would include "some shocking moments."). Confidential Appendix 1.

[57] *See CBS Response*, App. B at Bates stamped pgs. 72, 96, 195, 218-19. Confidential Appendix 2.

[58] *See CBS Response*, App. B at Bates stamped pgs. 123, 355, 447. Confidential Appendix 3.

19. CBS maintains that it selected Jackson and Timberlake "to minimize the possibility of the unexpected,"[59] but CBS was well aware that their selection did not obviate this risk. The NFL specifically expressed concerns to CBS about the costume that Jackson would wear during the halftime show.[60] Moreover, the NFL raised concerns about Timberlake's scripted line "gonna have you naked by the end of this song" that anticipated the stunt resulting in the broadcast nudity.[61] There were other warning signs as well. In a January 28, 2004 news item posted on MTV's website, Jackson's choreographer predicted that Jackson's performance would include "some shocking moments" and said "I don't think the Super Bowl has ever seen a performance like this . . ."[62] Shortly before the game, one halftime show performer asked about the length of the audio delay, a question that MTV employees evidently recognized implied an intention to depart from the script.[63] Further, MTV learned the morning of the Super Bowl telecast of plans

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[59] *Opposition* at 18. *See CBS Response* at 9 (stating that Jackson and Timberlake were "proven, experienced talent").

[60] *See CBS Response*, App. B at Bates stamped p. 72. Confidential Appendix 4.

[61] *See CBS Response*, App. B at Bates stamped pgs. 39, 452-54. Confidential Appendix 5. *Cf. CBS Radio License, Inc. (WLLD(FM))*, Notice of Apparent Liability for Monetary Forfeiture, 15 FCC Rcd 23881, 23883, ¶ 8 (Enf. Bur. 2000) (given licensee's awareness of the actual language used in performers' recordings, it should have taken precautions to avoid airing actionably indecent material during a live, unscripted broadcast).

[62] *See Super Bowl NAL*, 19 FCC Rcd at 19238-39, ¶ 19; *CBS Response*, App. D at Bates stamped pgs. 2659.

[63] *See CBS Response*, App. B at Bates stamped p. 462. Confidential Appendix 6.

to use tearaway cheerleading outfits for dancers in another halftime performance in connection with a scripted line ("I wanna take my clothes off") that is quite similar to Timberlake's line ("gonna have you naked by the end of this song").[64] The record reflects CBS's awareness that there is always a risk that performers will ad-lib remarks or take unscripted actions, and that the risk level varies according to the nature of the performance.[65] In sum, there was a significant and foreseeable risk in a halftime show seeking to push the envelope and replete with sexual content that performers might depart from script and staging, and this is particularly true of Jackson and Timberlake given the sexually-provocative nature of their performance, the fact that it was promoted as "shocking," and the fact that it culminated with the scripted line "gonna have you naked by the end of this song."[66] Based on examination of the record, we

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[64] *See CBS Response,* App. B at Bates stamped p. 458. Confidential Appendix 7.

[65] *See CBS Response*, App. B at Bates stamped pgs. 503-04, 511, 527. Confidential Appendix 5, 8. *See also supra*, ¶ 4. The risk of departures from the script was heightened here not only by the suggestive lyrics, but also by the fact that the line which occasioned Jackson's nudity was the culminating one in the script; the record reflects both the performers' and the producers' desire for a high-impact grand finale to the show. Confidential Appendix 9.

[66] *See Super Bowl NAL*, 19 FCC Rcd at 19237, ¶ 17 n.54, *citing Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 19 FCC Rcd 4975, 4979 (2004) (network could have anticipated that a recipient at a live award ceremony might use profanity because similar mishaps had occurred in the past). CBS points out that the *Golden Globe Awards Order* was released after the Super Bowl telecast, *Opposition* at 19, but the issue here is whether CBS could have anticipated an unscripted

conclude that CBS recognized the high risk that this broadcast raised of airing indecent material.[67]

20. Examination of the record also reveals that CBS failed to take adequate precautions to prevent the airing of unscripted indecent material. Aware of the risk of visual and spoken deviations from the script and staging—that something spontaneous might occur or be said—CBS made a calculated decision. It chose to rely on a five-second audio delay that would enable it to bleep offensive language but would not enable it to block unscripted visual moments. Thus, it could not cut off Jackson's "costume reveal" when it occurred—and it had no expectation that it would be able to block any indecent images.[68] Only *after* the Super Bowl halftime show —for the broadcast of the 2004 Grammy Awards—did CBS institute an audio *and* video delay "to ensure that no unexpected or unplanned video images would be

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costume reveal, not whether it had notice of the *Golden Globe Awards Order*.

[67] *See, e.g., supra*, ¶¶ 2, 4 and n.4.

[68] *See Opposition* at 5 ("Historically, a five-second delay has been adequate to preclude the broadcast of any spontaneous or unplanned audio material. With such an arrangement, an individual from the broadcast standards department monitors the transmission of a live event and manually 'hits the button' to delete any objectionable material before it is broadcast. Although both the audio and visual transmission is delayed, five seconds does not provide sufficient time to edit video images. Accordingly, the precaution of a five-second delay could not prevent the broadcast of the unexpected images at the end of the halftime show.") (emphasis added). As indicated above, CBS also had reason to believe that its five-second audio delay might be inadequate to edit unscripted audio material during the halftime show. *See* note *63 supra* and accompanying text.

broadcast."[69] CBS asserts that the delay used for the 2004 Grammy Awards was "unprecedented."[70] But CBS does not argue that use of a delay mechanism capable of editing video images during the Super Bowl halftime show would not have been feasible. The fact that use of such a delay mechanism would have been "far more technically complex and involved more broadcast standards staff to implement" than the delay that CBS actually used hardly excuses its omission under these circumstances.[71] Furthermore, CBS also failed to adopt other precautions available to it. For example, MTV's agreements with the performers did not require them to conform to the script or to CBS's broadcast standards and practices, notwithstanding the fact that MTV's agreement with the NFL contained provisions to this effect.[72] In addition, the record contains no evidence that MTV or CBS communicated CBS's broadcast standards and practices to Jackson, Timberlake, or Jackson's choreographer before the show, despite the highly sexualized nature of the performances and the fact that MTV's contract with the NFL required MTV to communicate those standards and practices to all performers.[73]

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[69] *CBS Response* at 5.

[70] *Id.* at 5, n.13.

[71] *CBS Response* at 5, n.13.

[72] *CBS Response*, App. B-C at Bates stamped pgs. 168-72, 431-34, 2152-2332, 2336-42, 2469. Confidential Appendix 10. CBS did not provide an executed agreement for either Jackson or Timberlake in response to the LOI, but none of the contract drafts provided by CBS refers to a script or to broadcast standards and practices. The executed agreement for Jackson's choreographer likewise contains no such references.

[73] See Confidential Appendix 10. Because CBS's failure to take reasonable precautions to prevent the broadcast of actionably indecent

21. CBS also overstates the level of care it exercised in overseeing the halftime production. Critically, it failed to investigate Jackson's choreographer's "shocking moments" prediction, which was posted on MTV's website, despite CBS's concern about unscripted remarks or actions.[74] In addition, contrary to its conten-

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material was conscious and deliberate, its reliance on *Mega Communications of New Britain Licensee, L.L.C.*, 19 FCC Rcd 11373 (Enf. Bur. 2004), is misplaced. *See Opposition* at 36, n.57 ("The same result should apply here, where Viacom took all reasonable precautions based on past experience—*including inspecting Ms. Jackson's costume*—but an unforeseeable violation nevertheless occurred."). The Bureau held in *Mega* that a licensee did not commit a willful violation of the Commission's antenna structure fencing requirements because it conducted regular inspections in compliance with those requirements and "the problem occurred shortly after an inspection by Mega." As the above discussion indicates, however, CBS consciously failed to prevent the airing of indecent material. Moreover, the *Mega* case is distinguishable because it involved actions by a third party, not the licensee. *Vernon Broadcasting, Inc.*, Memorandum Opinion and Order, 60 RR 2d 1275 (1986), illustrates this distinction. In *Vernon*, the Commission rescinded a forfeiture liability for a tower fencing violation as not willful, while affirming a liability for an unintentional violation of the public file rule. The distinction between the two situations was that the damage to the fence was caused by vandals, despite the station's regular process of inspections and repairs, whereas the public file violation arose from the station's own actions.

[74] *See* note 62 *supra* and accompanying text. CBS maintains that it interpreted the "shocking moments" quote innocently, stating that it believed the quote referred to Timberlake's surprise guest appearance, and that it "did not stand out because such hyperbolic language is not uncommon in the music world." *Opposition* at 7-8. As the Commission has indicated, CBS's explanation lacks credibility. *See NAL*, 19 FCC Rcd at 19239, n.64 ("at the start of the halftime segment, MTV included an onscreen credit for Timberlake, hardly a disclosure that would be made ten minutes before his appearance, had his participation in the program been the 'shocking moments' that it had publicized for days on its Internet site."). CBS's explanation also is dubious in light of the fact

tion,[75] each aspect of the halftime show was not reviewed in advance by CBS's Program Practices Department. As stated above, MTV learned for the first time on the morning of the Super Bowl telecast of plans for dancers to use tearaway cheerleading outfits to act out the line "I wanna take my clothes off."[76] It does not appear that these plans were reviewed by CBS's Program Practices Department because the rehearsals that CBS, MTV and NFL representatives reviewed occurred several days before the Super Bowl telecast, and the dancers were not in costume during the scene in question.[77]

22. Under these circumstances, we believe that CBS can and should be held responsible for the patently offensive material that it broadcast to a nationwide audience. A contrary result would permit a broadcast licensee to stage a show that "pushes the envelope," send that show out over the air waves, knowingly taking the risk that performers will engage in offensive unscripted acts or use offensive unscripted language, and then disavow responsibility—leaving no one legally responsible for the result. We believe that these are fully appropri-

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that the quote referred to "moments" in the plural, whereas it would have been expected to refer to a "moment" if it only concerned Timberlake's appearance. CBS has never provided a statement from Jackson's choreographer to explain what he meant by the quote. But even accepting CBS's argument that the choreographer's comment may have been innocent hyperbole, it should at least have caused CBS to look into the matter, given the level of concern at CBS and the NFL about the edgy lyrics and the possibility of inappropriate script departures. CBS gives no indication that it did so.

[75] *Opposition* at 4. *See CBS Response* at 9-10.

[76] *See CBS Response*, App. B at Bates stamped p. 458.

[77] *See CBS Response* at 9, App. B at Videotapes 6, 8 (Jackson/Timberlake Dress Rehersal).

ate circumstances for application of the "conscious and deliberate . . . omission" basis for finding "willfulness" incorporated by Congress into Section 503(b) of the Act.[78] Indeed, given the nondelegable nature of broadcast licensees' responsibility for programming and the means available to but declined by CBS to reduce the risk of the broadcast of indecent programming, it is difficult to conceive of a more appropriate context in which to apply that standard.

23. Further, CBS is legally responsible here for another reason; it is fully responsible for the actions of Jackson, Timberlake, and Jackson's choreographer under the doctrine of respondeat superior. "It is well established that traditional vicarious liability rules ordinarily make principals or employers vicariously liable for acts of their agents or employees in the scope of their authority or employment."[79] The Commission has long held licensees responsible for the unauthorized acts of their agents under this doctrine.[80] Respondeat superior subjects a principal to vicarious liability when its agent-employee commits a tort while acting within the

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[78] 47 U.S.C. § 503(b)(1); 47 U.S.C. § 312(f).

[79] *Meyer v. Holley*, 537 U.S. 280, 285 (2003) (citations omitted).

[80] *See Dial-a-Page, Inc.*, 8 FCC Rcd 2767 (1993), *recon. den.*, 10 FCC Rcd 8825 (1995) (rule violation resulting from employee error was fully attributable to licensee under doctrine of respondeat superior and "willful" within the meaning of § 503(b)(1)); *Wagenvoord Broadcasting Co.*, 35 FCC 2d 361 (1972); *Eure Family Ltd. Partnership*, 17 FCC Rcd 7042, 7044 ¶ 7 (Enf. Bur. 2002) ("it is a basic tenet of agency law that the actions of an employee or contractor are imputed to the employer and 'the Commission has consistently refused to excuse licensees from forfeiture penalties where actions of employees or independent contractors have resulted in violations.'").

scope of employment.[81] Whether an agent is an employee for purposes of respondeat superior depends on whether the agent is subject to the principal's control or right to control the performance of the work.[82] An agent-employee acts within the scope of employment when performing work assigned by the employer or engaging in a course of conduct subject to the employer's control.[83]

24. It is appropriate to impose vicarious responsibility on CBS for the willful actions of Jackson, Timberlake, and Jackson's choreographer under the doctrine of respondeat superior. Even assuming arguendo that the corporate officers and other corporate employees of CBS and MTV did not act willfully within the meaning of section 503(b)(1), there is no question that the performers did. Timberlake's declaration acknowledges a premeditated plan for him to tear off part of Jackson's clothing during the performance.[84] Jackson, Timberlake, and Jackson's choreographer were CBS agents for the halftime show performance; Jackson and Timberlake entered into agreements with MTV (MTV and CBS at the time were both Viacom subsidiaries) to perform during the halftime show, and Gil Duldulao contractually

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[81] *Restatement (Second) of Agency* § 219(1) (1957) (2nd Restatement). *See also Restatement (Third) of Agency* § 7.07 (T.D. No. 5 2004) (3rd Restatement).

[82] 2nd Restatement § 220. *See also* 3rd Restatement § 7.07.

[83] 2nd Restatement § 228.

[84] *CBS Response* at Att. 8 ("At the end of the song, I attempted to perform a 'costume reveal' by removing a portion of Ms. Jackson's costume and revealing the undergarment beneath. I had neither the intention nor the knowledge that the reveal could expose her right breast. The decision to add the 'costume reveal' to the finale was made by Ms. Jackson and her choreographer after final rehearsals for the Halftime Show. They informed me just before the performance began.").

agreed to choreograph the dance.[85] Based on examination of the record, we also believe that the three were CBS employees for purposes of applying the principle of respondeat superior. CBS had the right to control, and in fact exercised considerable control over, the halftime show:

> Each aspect of the halftime show was scripted in advance and a script of the halftime show was reviewed by the CBS Program Practices Department. In addition, employees of CBS, MTV, and the NFL attended two full run-throughs of the halftime show on Thursday, January 29 to review the production. The run throughs were videotaped, and reviewed by representatives of CBS and the NFL. MTV producers then used the tape to individually review the rehearsal performances with the talent to instruct them on changes to be made in the actual performance on Super Bowl Sunday. Based on these procedures, certain changes were made to the show. For example, the costume worn by one of the dancers during the run-throughs was considered to be too revealing, and she was instructed to change it before the final show. There was also concern about some of the language, and changes were suggested . . . . Because Ms. Jackson was not in costume during the run-throughs, an executive producer subsequently checked to make

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[85] *See CBS Response*, App. B-C at Bates stamped pgs. 168-72, 431-34, 2152-2332, 2336-42; 2nd Restatement § 1 ("Agency is a legal concept which depends upon the existence of required factual elements: the manifestation by the principal that the agent shall act for him, the agent's acceptance of the undertaking and the understanding of the parties that the principal is to be in control of the undertaking."), *cited in Meyer v. Holley*, 537 U.S. at 286.

sure that Ms. Jackson's wardrobe would conform to broadcast standards during the actual performance.[86]

25. Thus, CBS exercised control over all aspects of the performers' conduct in the performance of the halftime show, including the script, staging and wardrobe used during the Jackson-Timberlake performance. Other factual indicia of control are present as well. CBS (through MTV) provided the set and set elements for the performance and dictated its time and place, as well as the time and place of production and press-related activities.[87] Many courts have held entertainers to be employees for respondeat superior and other purposes under similar circumstances.[88] Finally, the performers'

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[86] *CBS Response* at 9-10. Although CBS had the right to exercise control over the halftime show, and in fact exercised considerable control, there were, as discussed above, significant lapses in the level of care that it exercised in overseeing the halftime production. *See* para. 17-22. Those lapses in supervision do not, however, negate the fact that the performances were subject to CBS's control and that CBS was thus vicariously responsible for the performers' actions within the scope of their employment under the doctrine of respondeat superior. *See* note 87 *infra*.

[87] *Id.* at Bates-stamped pgs. 168-72, 431-34, 2336-42. *See* 2nd Restatement § 220; 3rd Restatement § 7.07 (relevant factual indicia of control include "whether the agent or the principal supplies the tools and other instrumentalities required for the work and the place in which to perform it").

[88] *See P.T. Barnum's Nightclub v. Duhamell*, 766 N.E.2d 729 (Ind. App. 2002) (referring to 2nd Restatement factors in affirming denial of summary judgment as to whether male exotic dancer was an employee for respondeat superior purposes where "the Club exercised some degree of control over Ajishegiri's work, particularly with regard to work hours, conditions, and regulations, and was in the business of displaying adult entertainers (primarily female), but did not dictate the stylistic aspects of Ajishegiri's performance"); *White v. Frenkel*, 615

actions were clearly within the scope of their employment. In this regard, the determining factor is not whether their actions were authorized by CBS but whether the performance was subject to CBS's control.[89] Put differently, their conduct was incident to the performance rather than "an independent course of conduct intended to serve no purpose of the employer."[90] Accord-

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So.2d 535, 538-40 (La. App. 3 Cir. 1993) (professional wrestler was employee for respondeat superior purposes where, *inter alia*, promoter controlled who would win and who would lose wrestler's matches and had total control over who, where, and when wrestler wrestled); *Jeffcoat v. State Dept. of Labor*, 732 P.2d 1073, 1075-78 (Alaska 1987) (dancer was employee for purposes of state labor statute where, *inter alia*, club exercised some control over costumes and dances and total control over music and dancers' working hours); *Jack Hammer Assoc. v. Delmy Productions, Inc.*, 499 N.Y.S.2d 418, 419-20 (1st Dept. 1986) (actor was employee for purposes of determining availability of workers' compensation benefits where actor entered into a written contract for a stipulated sum for a term certain, time and place for his work was determined by production company, actor had to perform in a certain number of shows at specified times, and he had to follow a script and was subject to supervision of play's director). New York state courts have consistently held entertainers to be employees of the producers who engage them. *See Jack Hammer Assoc.*, 499 N.Y.S.2d at 419-20; *Challis v. Nat'l Producing Co.*, 88 N.Y.S.2d 731 (3d Dept. 1949) (circus clown); *Berman v. Barone*, 88 N.Y.S.2d 327, 328 (3d Dept. 1949) (ballet dancer and variety artist). *See also In re Sims*, 602 N.Y.S.2d 225 (3d Dept. 1993) (finding a sufficient degree of direction and control by a conductor who hired musicians for imposition of respondeat superior liability although supervision was not direct). Here, the performers' agreements contain choice-of-law provisions specifying New York law. *CBS Response* at Bates-stamped pgs. 168-72, 431-34, 2336-42.

[89] 2nd Restatement § 228.

[90] 3rd Restatement § 7.07 ("an employee's conduct is outside the scope of employment when it occurs within an independent course of conduct intended to serve no purpose of the employer."). *See also id.* ("Alternative formulations avoid the use of motive or intention to

ingly, the performers' willful actions are fully attributable to CBS under the doctrine of respondeat superior irrespective of whether the performers' actions were authorized by CBS.

26. *Amount of Forfeiture.* CBS offers a variety of arguments that the forfeiture proposed in the *NAL* is excessive or unfair. First, it contends that it is unfair to impose a forfeiture on it, when no forfeiture was imposed on those affiliates of the CBS Television Network that are not owned by CBS.[91] Second, CBS argues that the *NAL* improperly cites "the history of recent indecent broadcasts by CBS owned radio stations" with a footnote to cases that are not completely adjudicated.[92] Third, CBS maintains that the forfeiture is excessive in relation to the duration of the nude scene and in light of CBS's precautionary measures.[93] Fourth, CBS argues that it had no prior notice that a brief scene of partial

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determine whether an employee's tortious conduct falls within the scope of employment. These tests vary somewhat in how they articulate the requisite tie between the tortfeasor's employment and the tort. In general, such a tie is present only when the tort is a generally foreseeable consequence of the enterprise undertaken by the employer or is incident to it.").

[91] *Opposition* at 14.

[92] *Id.* at 39-40. CBS relies on section 504(c) of the Act, which provides that the Commission may not use the issuance of a notice of apparent liability in any other proceeding involving that person unless the forfeiture has been paid or there is a final court order for the payment of the forfeiture. CBS argues that the Commission not only must ignore cases in which there has been no final adjudication, but that it must consider CBS's long record of compliance with broadcast standards. *Id.* at 42.

[93] *Id.* at 41-43.

nudity constituted actionable indecency and thus should not be subject to any forfeiture.[94]

27. We conclude that CBS's arguments do not justify a reduction in the amount of the proposed forfeiture. The *NAL* proposed no forfeiture against CBS Television Network affiliate stations that are not owned by Viacom because there is no evidence that the licensees of any of those stations played any role in the selection, planning or approval of the halftime show or that they could have reasonably anticipated that CBS's production of the halftime show would include partial nudity. CBS has not provided any contrary evidence. In contrast, CBS admits that it was closely involved in the production of the halftime show, and that its MTV affiliate produced it.

28. With respect to the *NAL*'s reference to the history of indecent broadcasts by CBS's radio stations, we note that those cases have been resolved by a Consent Decree in which CBS admitted to certain violations, and the Commission agreed not to use that admission against CBS in any other proceeding, including this one.[95] Accordingly, we no longer rely on that history of indecent broadcasts in reaching our determination here.

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[94] *Id.* at 43.

[95] *See Viacom Inc.*, Order, 19 FCC Rcd 23100 (2004), *petition for recon. pending*. In light of that Consent Decree, entered into after the *NAL*, we conclude that CBS's history of past offenses is not relevant to our analysis. We note, however, that we disagree with, and have previously rejected, CBS's interpretation of section 504(c). We have made it clear that the Commission may rely on the underlying facts that provide the basis for a notice of apparent liability in a separate case. *See Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 15 FCC Rcd 303, 304-05, ¶¶ 3-5 (1999) ("*Forfeiture Policy Statement*"), *recon. denied*, 17 FCC Rcd 303 (1999).

Nevertheless, we remain convinced that the upward adjustment to the statutory maximum is appropriate in light of all of the factors enumerated in section 503(b)(2)(D) of the Act, particularly the circumstances involving the preparation, execution and promotion of the halftime show by CBS, the gravity of the violation in light of the nationwide audience for the indecent broadcast, and CBS's ability to pay.[96] The crux of CBS's defense is that the blame lies with the performers who planned and carried out the costume reveal that resulted in the exposure of Jackson's breast. However, CBS's attempt to place blame on the performers in question is unavailing; as discussed above, the performers were acting as CBS's agents and CBS is responsible for their actions within the scope of their employment. In addition, CBS planned almost every element of the halftime show. In the course of doing so, it brushed off warning signs of the potential for actionably indecent behavior and failed to take adequate precautions to prevent the airing of indecent material. As a result of its decisions, an enormous nationwide audience,[97] including numerous children, was subjected without warning to the offensive spectacle of a man tearing off a woman's clothing on stage in the midst of a sexually charged performance. Finally, regarding the element of ability to pay and fi-

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[96] *See* 47 U.S.C. § 503(b)(2)(D) (the Commission "shall take into account the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require"); *NAL*, 19 FCC Rcd at 19237, ¶ 17.

[97] *See* http://www.usatoday.com/sports/football/super/2004-02-02-ratings_x.htm (stating that Super Bowl XXXVIII was "most-watched Super Bowl in history" with estimated 143.6 million viewers and 41.3 national rating).

nancial disincentives to violate the Act and rules,[98] we find that CBS's size and resources, without question, support an upward adjustment to the maximum statutory forfeiture of $550,000 because a lesser amount would not serve as a significant penalty or deterrent to a company of its size and resources.[99]

29. We also reject CBS's claim that it lacked prior notice that a brief scene of partial nudity might result in a forfeiture. Our rule against the broadcast of indecent material outside of the safe harbor hours has been in effect since 1993,[100] and our criteria for determining whether material is indecent were clearly spelled out in the *Policy Statement* issued in 2001. Furthermore, the *Young Broadcasting* decision, holding that a brief display of male frontal nudity was an apparent violation of that rule, was released shortly before the subject Super Bowl broadcast.[101] Thus, CBS was on notice that the

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[98] *See* 47 C.F.R. § 1.80, Note to Paragraph (b)(4), Section II, Upward Adjustment Criterion No. 2.

[99] *See* "Viacom Takes Big Write-Down, Creating a Loss," *New York Times*, Feb. 25, 2005, at C1 (reporting that Viacom, Inc. took a non-cash charge for 2004 to write down the value of its assets by 27%, to $49 billion, and that the company's revenue for the final quarter of 2004 was $6.3 billion); "While Shares Fell, Viacom Paid Three $160 Million," *New York Times*, April 16, 2005, at C1 (reporting that the company's top three executives received a total of $160 million in compensation for 2004).

[100] *See Enforcement of Prohibitions Against Broadcast Indecency*, Report and 8 FCC Rcd 704 (1993), *modified*, 10 FCC Rcd 10558 (1995). CBS, Inc. and Infinity Broadcasting Corporation, both of which became Viacom, Inc. subsidiaries, submitted comments in that rulemaking proceeding. *Id.*, 8 FCC Rcd at 712.

[101] *Young Broadcasting*, 19 FCC Rcd at 1751 (release date of January 27, 2004).

broadcast of partial nudity could violate the indecency rule and statute. CBS tries to liken its situation to that of NBC in the *Golden Globe Order*, where we declined to impose a forfeiture because we overruled precedent that had specifically held that isolated expletives were not actionably indecent.[102] We have never held, however, that fleeting nudity is not actionably indecent. On the contrary, as discussed above, we held that fleeting nudity was indecent in *Young Broadcasting* before the Super Bowl broadcast at issue here. The fact that this case is not identical to Young *Broadcasting* (or, indeed, any other case) certainly does not preclude us from imposing a forfeiture. The facts of most indecency cases are not identical to any that precede them. For example, the Commission has not been confronted before this case with a broadcast where a male performer ripped off the clothing of a female performer to reveal her breast in the midst of a song containing repeated sexual references and a dance containing simulated sexual activities. But any argument that CBS lacked adequate notice that such a performance would run afoul of the Commission's indecency regulations is groundless. The Commission is applying an established standard to the facts of a new case and is not overruling precedent. Thus, it is entirely lawful and appropriate to impose a forfeiture when we determine that the licensee has violated that standard.[103]

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[102] *Opposition* at 19, 27-28.

[103] As we find CBS legally responsible for the indecent broadcast based on both its own willful omission and its vicarious liability for the willful acts of its agents under the principle of respondeat superior, we need not address whether it could also be held responsible under Section 503(b)(1)(D) without a showing of willfulness.

30. *Constitutional Issues.* CBS offers a number of arguments attacking then constitutional underpinnings of the Commission's indecency framework. We find no merit in those arguments.

31. We reject CBS's arguments that the Commission's indecency standard is vague, overbroad, and vests the Commission with excessive discretion.[104] Courts have upheld the indecency standard applied in the *NAL* and in this *Order* against facial vagueness and overbreadth challenges.[105] The D.C. Circuit also has rejected the argument that the Commission's indecency standard is overbroad because it may encompass material with serious merit.[106] We do not believe that requiring broadcasters to exercise care to prevent a televised depiction of naked sexual organs prior to 10 p.m. unduly "chills" exercise of their First Amendment rights. As the D.C.

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[104] *Opposition* at 65-77.

[105] *See ACT III*, 58 F.3d at 659 (upholding the Commission's indecency definition against facial vagueness and overbreadth challenges). CBS's arguments about the Commission's discretion focus on the Commission's investigatory practices in cases where a complaint is based on a description of allegedly offensive programming, and not supported by a tape or a transcript. *Opposition* at 74-76. However, those arguments have nothing to do with this case, in which there was no dispute about what was broadcast and in which CBS issued a public apology to viewers for the violation of its broadcast standards. Similarly, CBS's contention about delay in the Commission's enforcement process (*Opposition* at 76-77) is irrelevant to this case. We also note that the D.C. Circuit has previously rejected this argument. *Action for Children's Television v. FCC*, 59 F.3d 1249, 1261-62 (D.C. Cir. 1995) ("*ACT IV*"), *cert. denied*, 516 U.S. 1072 (1996).

[106] *Action for Children's Television v. FCC*, 852 F.2d 1332, 1339 (D.C. Cir. 1988) ("*ACT I*") ("'serious merit' need not, in every instance, immunize material from FCC channeling authority").

Circuit observed, "some degree of self-censorship is inevitable and not necessarily undesirable so long as proper standards are available."[107]

32. We also disagree with CBS that the *NAL* is inconsistent with the Supreme Court's *Pacifica* decision.[108] *Pacifica* stressed the importance of contextual analysis such as that reflected in this *Order*.[109] Accordingly, we do not read *Pacifica* as precluding an indecency finding based on a brief depiction of partial nudity. The Supreme Court specifically stated that it had not decided whether an occasional expletive in a different setting (*e.g.*, a two-way radio conversation between a cab driver and a dispatcher, or a telecast of an Elizabethan comedy) would justify any sanction.[110] The Court's emphasis on the narrowness of its holding was meant to highlight the "all-important" role of context, not to deprive the Commission of power to regulate broadcast indecency

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[107] *ACT IV*, 59 F.3d at 1261; *see ACT III*, 58 F.3d at 666 ("Whatever chilling effect may be said to inhere in the regulation of indecent speech, these have existed ever since the Supreme Court first upheld the FCC's enforcement of section 1464 of the Radio Act.").

[108] *Opposition* at 44-53. In making this argument, CBS generally ignores the specific context of this case, preferring instead to opine about live television coverage of political and other events and even to lament "the end of live broadcasting as we know it." *Id.* at 48. We reiterate that our decision is limited to the specific context of this case, which involves a Super Bowl halftime entertainment show that was produced by CBS, using performers selected and paid by CBS. For the reasons stated in the *NAL* and in this *Order*, there is ample support for our conclusion that CBS failed to take reasonable precautions to ensure that no actionably indecent material was broadcast in this context.

[109] *Pacifica*, 438 U.S. at 742 ("indecency is largely a function of context--it cannot be adequately judged in the abstract").

[110] *Id.*, 438 at 750; *see id.* at 760-61 (Powell, J., concurring).

except in situations involving extended or repetitious expletives or depictions of sexual or excretory organs or activities.[111]

33. CBS also claims that the constitutional validity of our indecency enforcement practice has been undermined by a changed legal and technological landscape, citing the Supreme Court's decisions in *United States v. Playboy Entertainment Group, Inc.*,[112] *Reno v. ACLU*,[113] and *Denver Area Educational Telecommunications Consortium v. FCC*,[114] and pointing to the pervasiveness of cable and satellite television, and the development of online media and media recording technology (*e.g.*, videocassette recorders, DVD recorders and personal video recorders featuring time-shifting technology) and the V-chip.[115] Again, we disagree. In striking down as unconstitutional an Internet indecency standard, the Supreme Court expressly recognized in *Reno* the "special justifications for regulation of the broadcast media," citing *Red Lion* and *Pacifica*.[116] Moreover, in *Denver Area*,

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[111] *Id.* at 750. The D.C. Circuit upheld the Commission's interpretation of *Pacifica* as not imposing such limits. *See ACT I*, 852 F.2d at 1338 (upholding the Commission's decision to depart from its prior policy of acting only in cases involving "the repeated use, for shock value, of words similar to those satirized in the Carlin 'Filthy Words' monologue. . . . The FCC rationally determined that its former policy could yield anomalous, even arbitrary, results.").

[112] 529 U.S. 803 (2000).

[113] 521 U.S. 844 (1997).

[114] 518 U.S. 717 (1996).

[115] *Opposition* at 53-61.

[116] Similarly, in *Playboy*, the Court distinguished broadcast services from cable due to differences in the nature of those media. *See United States v. Playboy Entertainment Group, Inc.*, 529 U.S. at 815.

the Court addressed the constitutionality of a Commission order implementing provisions of the 1992 Cable Television Consumer Protection and Competition Act that concerned indecent and obscene cable programming, not over-the-air broadcasting. We find nothing in that opinion that undermines the constitutionality of our framework for enforcing our rule against the broadcast of indecent material outside the safe harbor hours.

34. Furthermore, CBS's arguments about new technologies have no apparent application to this case. The V-chip technology cannot be utilized to block sporting events such as the Super Bowl because sporting events are not rated.[117] Nevertheless, even if the V-chip could be used to block sporting events, based on CBS's representations it appears that CBS would not have rated the Super Bowl halftime show as inappropriate for children.

35. Finally, we address CBS's dire warnings that imposing sanctions in this case will have a chilling effect on

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[117] *See Implementation of Section 551 of the Telecommunications Act of 1996*, Report and Order, 13 FCC Rcd 8232, 8242-43, ¶ 21 (1998) (news programming, sports programming and advertisements are not included in the V-chip ratings system). Outside of the context of exempt programming such as sports programming, we agree that the V-chip is an important protection, but it does not eliminate the need for enforcing our indecency rule or undermine the constitutionality of that rule. We note that last year, CBS and the other major networks announced their participation with the Advertising Council in an educational campaign designed to improve awareness of the V-chip. The announcement stated that less than 10 percent of all parents are using the V-chip and 80 percent of all parents who currently own a television set with a V-chip are not aware that they have it. *See* News Release, "The Advertising Council and Four Major Television Networks Announce Unprecedented Partnership to Educate Parents About the V-Chip," http://www.adcouncil.org/about/news_033004 (March 30, 2004). In addition, numerous television sets in U.S. households lack V-chips.

live coverage of public events, such as national political conventions and presidential scandals, and "violates the Commission's own pledge" to "take no action which would inhibit broadcast journalism."[118] While we are sensitive to the impact of our decisions on speech and, in particular, on live news coverage, we do not believe that CBS's fears about the chilling effect of our decision here are well-founded. As discussed in detail above, this case involves a staged show planned by CBS and its affiliates, under circumstances where they had the means to exercise control and good reasons to take precautionary measures. These circumstances are obviously completely different from live coverage of breaking news events, which are not controlled by broadcasters, and this decision in no way suggests that we are imposing strict liability for such coverage or, indeed, any other programming.

36. *Conclusion.* Under section 503(b)(1)(B) of the Act, any person who is determined by the Commission to have willfully failed to comply with any provision of the Act or any rule, regulation, or order issued by the Commission shall be liable to the United States for a monetary forfeiture penalty.[119] In order to impose such a forfeiture penalty, the Commission must issue a notice of apparent liability, the notice must be received, and the person against whom the notice has been issued must have an opportunity to show, in writing, why no such forfeiture penalty should be imposed.[120] The Commission will then issue a forfeiture if it finds by a pre-

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[118] *Opposition* at 53, *quoting Pacifica Reconsideration Order*, 59 FCC 2d at 893. *See also Opposition* at ix, x, 46, 48-53.

[119] 47 U.S.C. § 503(b)(1)(B); 47 C.F.R. § 1.80(a)(1).

[120] 47 U.S.C. § 503(b); 47 C.F.R. § 1.80(f).

ponderance of the evidence that the person has violated the Act or a Commission rule. For the reasons set forth above, we conclude under this standard that CBS is liable for a forfeiture for its willful violation of 18 U.S.C. § 1464 and section 73.3999 of the Commission's rules.

37. The Commission's *Forfeiture Policy Statement* sets a base forfeiture amount of $7,000 for transmission of indecent materials.[121] The *Forfeiture Policy Statement* also specifies that the Commission shall adjust a forfeiture based upon consideration of the factors enumerated in section 503(b)(2)(D) of the Act, 47 U.S.C. § 503(b)(2)(D) , such as "the nature, circumstances, extent and gravity of the violation, and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require."[122] In this case, taking all of these factors into consideration, for the reasons set forth above, we find that the *NAL* properly proposed the statutory maximum forfeiture of $550,000 against CBS.

IV. ORDERING CLAUSES

38. Accordingly, IT IS ORDERED THAT, pursuant to section 503(b) of the Act[123], and sections 0.311 and 1.80(f)(4) of the Commission's Rules[124], CBS Corporation IS LIABLE FOR A MONETARY FORFEITURE in the amount of $550,000 for willfully violating 18 U.S.C. § 1464 and section 73.3999 of the Commission's rules.

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[121] *Forfeiture Policy Statement*, 12 FCC Rcd at 17113.

[122] *Id.*, 12 FCC Rcd at 17100-01, ¶ 27.

[123] 47 U.S.C. § 503(b).

[124] 47 C.F.R. §§ 0.311 , 1.80(f)(4).

39. Payment of the forfeiture shall be made in the manner provided for in section 1.80 of the Commission's rules within 30 days of the release of this *Order*. If the forfeiture is not paid within the period specified, the case may be referred to the Department of Justice for collection pursuant to section 504(a) of the Act.[125] Payment of the forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the NAL/Acct. No. referenced above and the FRN(s) referenced in the Appendix. Payment by check or money order may be mailed to Federal Communications Commission, P.O. Box 358340, Pittsburgh, PA 15251-8340. Payment by overnight mail may be sent to Mellon Bank/LB 358340, 500 Ross Street, Room 1540670, Pittsburgh, PA 15251. Payment by wire transfer may be made to ABA Number 043000261, receiving bank Mellon Bank, and account number 911-6106.

40. Requests for payment under an installment plan should be sent to: Associate Managing Director—Financial Operations, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554.[126]

41. IT IS FURTHER ORDERED THAT a copy of this FORFEITURE ORDER shall be sent by Certified Mail, Return Receipt Requested to CBS Corporation, 2000 K Street, N.W., Suite 725, Washington, DC 20006, and to its counsel, Robert Corn-Revere, Esquire, Davis Wright Tremaine LLP, 1500 K Street, N.W., Washington, DC 20005.

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[125] 47 U.S.C. § 504(a).

[126] *See* 47 C.F.R. § 1.1914.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

STATEMENT OF
CHAIRMAN KEVIN J. MARTIN

Re: Complaints Against Various Television Licensees Concerning Their February 1, 2004 Broadcast of the Super Bowl XXXVIII Halftime Show; Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005; Complaints Against Various Television Licensees Concerning Their December 31, 2004 Broadcast of the Program "Without A Trace"

Congress has long prohibited the broadcasting of indecent and profane material and the courts have upheld challenges to these standards. But the number of complaints received by the Commission has risen year after year. They have grown from hundreds, to hundreds of thousands. And the number of programs that trigger these complaints continues to increase as well. I share the concerns of the public—and of parents, in particular—that are voiced in these complaints.

I believe the Commission has a legal responsibility to respond to them and resolve them in a consistent and effective manner. So I am pleased that with the decisions released today the Commission is resolving hundreds of thousands of complaints against various broadcast licensees related to their televising of 49 different programs. These decisions, taken both individually and as a whole, demonstrate the Commission's continued commitment to enforcing the law prohibiting the airing of obscene, indecent and profane material.

Additionally, the Commission today affirms its initial finding that the broadcast of the Super Bowl XXXVIII Halftime Show was actionably indecent. We appropri-

ately reject the argument that CBS continues to make that this material is not indecent. That argument runs counter to Commission precedent and common sense.

STATEMENT OF COMMISSIONER MICHAEL J. COPPS

Re: *Complaints Regarding Various Television Broadcasts Between January 1, 2002 and March 12, 2005*, Notices of Apparent Liability and Memorandum Opinion and Order

Complaints Against Various Television Licensees Concerning Their December 31, 2004 Broadcast of the Program "Without A Trace", Notice of Apparent Liability

Complaints Against Various Television Licensees Concerning Their February 1, 2004 Broadcast Of The Super Bowl XXXVII Halftime Show, Forfeiture Order

In the past, the Commission too often addressed indecency complaints with little discussion or analysis, relying instead on generalized pronouncements. Such an approach served neither aggrieved citizens nor the broadcast industry. Today, the Commission not only moves forward to address a number of pending complaints, but does so in a manner that better analyzes each broadcast and explains how the Commission determines whether a particular broadcast is indecent. Although it may never be possible to provide 100 percent certain guidance because we must always take into account specific and often-differing contexts, the approach in today's orders can help to develop such guidance and to establish precedents. This measured process, common in jurisprudence, may not satisfy those who clamor for immediate certainty in an uncertain world, but it may just be the best way to develop workable rules of the road.

Today's Orders highlight two additional issues with which the Commission must come to terms. First, it is time for the Commission to look at indecency in the broader context of its decisions on media consolidation. In 2003 the FCC sought to weaken its remaining media concentration safeguards without even considering whether there is a link between increasing media consolidation and increasing indecency. Such links have been shown in studies and testified to by a variety of expert witnesses. The record clearly demonstrates that an overwhelming number of the Commission's indecency citations have gone to a few huge media conglomerates. One recent study showed that the four largest radio station groups which controlled just under half the radio audience were responsible for a whopping 96 percent of the indecency fines levied by the FCC from 2000 to 2003.

One of the reasons for the huge volume of complaints about excessive sex and graphic violence in the programming we are fed may be that people feel increasingly divorced from their "local" media. They believe the media no longer respond to their local communities. As media conglomerates grow ever larger and station control moves farther away from the local community, community standards seem to count for less when programming decisions are made. Years ago we had independent programming created from a diversity of sources. Networks would then decide which programming to distribute. Then local affiliates would independently decide whether to air that programming. This provided some real checks and balances. Nowadays so many of these decisions are made by vertically-integrated conglomerates headquartered far away from the communities they are supposed to be serving—entities

that all too often control both the distribution ***and*** the production content of the programming.

If heightened media consolidation is indeed a source for the violence and indecency that upset so many parents, shouldn't the Commission be cranking that into its decisions on further loosening of the ownership rules? I hope the Commission, before voting again on loosening its media concentration protections, will finally take a serious look at this link and amass a credible body of evidence and not act again without the facts, as it did in 2003.

Second, a number of these complaints concern graphic broadcast violence. The Commission states that it has taken comment on this issue in another docket. It is time for us to step up to the plate and tackle the issue of violence in the media. The U.S. Surgeon General, the American Academy of Pediatrics, the American Psychological Association, the American Medical Association, and countless other medical and scientific organizations that have studied this issue have reached the same conclusion: exposure to graphic and excessive media violence has harmful effects on the physical and mental health of our children. We need to complete this proceeding.

STATEMENT OF COMMISSIONER JONATHAN S. ADELSTEIN CONCURRING

Re: *Complaints Against Various Television Licensees Concerning Their February 1, 2004 Broadcast of the Super Bowl XXXVIII Halftime Show,* Forfeiture Order

I have sworn an oath to uphold the Constitution[1] and to carry out the laws adopted by Congress.[2] Trying to find a balance between these obligations has been challenging in many of the indecency cases that I have decided. I believe it is our duty to regulate the broadcast of indecent material to the fullest extent permissible by the Constitution because safeguarding the well-being of our children is a compelling national interest.[3] I therefore have supported efforts to step up our enforcement of indecency laws since I joined the Commission.

The Commission's authority to regulate indecency over the public airwaves was narrowly upheld by the Supreme Court with the admonition that we should exercise that authority with the utmost restraint, lest we inhibit constitutional rights and transgress constitutional limitations on government regulation of protected speech.[4] Given the Court's guidance in *Pacifica,* the

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[1] U.S. Const., amend. I.

[2] Congress has specifically forbidden the broadcast of obscene, indecent or profane language. 18 U.S.C. § 1464. It has also forbidden censorship. 47 U.S.C. § 326.

[3] *See,* e.g., *N.Y. v. Ferber,* 458 U.S. 747, 756-57 (1982).

[4] *See FCC v. Pacifica Foundation,* 438 U.S. 726, 750 (1978) (emphasizing the "narrowness" of the Court's holding); *Action for Children's*

Commission has repeatedly stated that we would judiciously walk a "tightrope" in exercising our regulatory authority.[5] Hence, within this legal context, a rational and principled "restrained enforcement policy" is not a matter of mere regulatory convenience. It is a constitutional requirement.[6]

Accordingly, I concur with today's Super Bowl Order, but concur in part and dissent in part with the companion Omnibus Order[7] because, while in some ways today's Omnibus decision goes too far, in other ways it does not go far enough. Significantly, it abruptly departs from our precedents by adopting a new, weaker enforcement mechanism that arbitrarily fails to assess fines against broadcasters who have aired indecent material. Additionally, while today's Omnibus decision appropriately identifies violations of our indecency laws, not every instance determined to be indecent meets that standard.

We have previously sought to identify all broadcasters who have aired indecent material, and hold them

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Television v. FCC, 852 F.2d 1332, 1344 (D.C. Cir. 1988) ("*ACT I*") ("Broadcast material that is indecent but not obscene is protected by the [F]irst [A]mendment.").

[5] *See* Brief for Petitioner, FCC, 1978 WL 206838 at *9.

[6] *ACT I, supra* note 4, at 1344 ("the FCC may regulate [indecent] material only with due respect for the high value our Constitution places on freedom and choice in what the people say and hear."); *Id.* at 1340 n.14 ("[T]he potentially chilling effect of the FCC's generic definition of indecency will be tempered by the Commission's restrained enforcement policy.").

[7] *Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, Notices of Apparent Liability and Memorandum Opinion and Order (decided March 15, 2006) (hereinafter "Omnibus Order").

accountable. In the Omnibus Order, however, the Commission inexplicably fines only the licensee whose broadcast of indecent material was the subject of a viewer's complaint, even though we know millions of other Americans were exposed to the offending broadcast. I cannot find anywhere in the law that Congress told us to apply indecency regulations only to those stations against which a complaint was specifically lodged. The law requires us to prohibit the broadcast of indecent material, period. This means that we must enforce the law anywhere we determine it has been violated. It is willful blindness to decide, with respect to network broadcasts we know aired nationwide, that we will only enforce the law against the local station that happens to be the target of viewer complaints. How can we impose a fine solely on certain local broadcasters, despite having repeatedly said that the Commission applies a national indecency standard—not a local one?[8]

The failure to enforce the rules against some stations but not others is not what the courts had in mind when they counseled restraint. In fact, the Supreme Court's decision in *Pacifica* was based on the uniquely pervasive characteristics of broadcast media.[9] It is patently arbitrary to hold some stations but not others accountable for the same broadcast. We recognized this just two

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[8] *See, e.g., In re Sagittarius Broadcasting Corporation*, Memorandum Opinion and Order, 7 FCC Rcd 6873, 6876 (1992) (subsequent history omitted).

[9] *See Pacifica Found.*, 438 U.S. at 748-49 (recognizing the "uniquely pervasive presence" of broadcast media "in the lives of all Americans"). In today's Order, paragraph 10, the Commission relies upon the same rationale.

years ago in *Married By America*.[10] The Commission simply inquired who aired the indecent broadcast and fined all of those stations that did so.

In the *Super Bowl XXXVIII Halftime Show* decision, we held only those stations owned and operated by the CBS network responsible, under the theory that the affiliates did not expect the incident and it was primarily the network's fault.[11] I dissented in part to that case because I believed we needed to apply the same sanction to every station that aired the offending material. I raise similar concerns today, in the context of the Omnibus Order.

The Commission is constitutionally obligated to decide broadcast indecency and profanity cases based on the "contemporary community standard," which is "that of the average broadcast viewer or listener." The Commission has explained the "contemporary community standard," as follows:

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[10] *See Complaints Against Various Licensees Regarding Their Broadcast of the Fox Television Network Program "Married by America" on April 7, 2003*, Notice of Apparent Liability for Forfeiture, 19 FCC Rcd 20191, 20196 (2004) (proposing a $7,000 forfeiture against each Fox Station and Fox Affiliate station); *reconsideration pending. See also Clear Channel Broadcast Licenses, Inc.*, 19 FCC Rcd 6773, 6779 (2004) (proposing a $495,000 fine based on a "per utterance" calculation, and directing an investigation into stations owned by other licensees that broadcast the indecent program). In the instant Omnibus Order, however, the Commission inexplicably fines only the licensee whose broadcast of indecent material was actually the subject of a viewer's complaint to the Commission. *Id.* at ¶ 71.

[11] *See Complaints Against Various Television Licensees Concerning Their February 1, 2004, Broadcast of the Super Bowl XXXVIII Halftime Show*, Notice of Apparent Liability, 19 FCC Rcd 19230 (2004).

> We rely on our collective experience and knowledge, developed through constant interaction with lawmakers, courts, broadcasters, public interest groups and ordinary citizens, to keep abreast of contemporary community standards for the broadcast medium.[12]

I am concerned that the Omnibus Order overreaches with its expansion of the scope of indecency and profanity law, without first doing what is necessary to determine the appropriate contemporary community standard.

The Omnibus Order builds on one of the most difficult cases we have ever decided, the *Golden Globe Awards* case,[13] and stretches it beyond the limits of our precedents and constitutional authority. The precedent set in that case has been contested by numerous broadcasters, constitutional scholars and public interest groups who have asked us to revisit and clarify our reasoning and decision. Rather than reexamining that case, the majority uses the decision as a springboard to add new words to the pantheon of those deemed to be inherently sexual or excretory, and consequently indecent and profane, irrespective of their common meaning or of a fleeting and isolated use. By failing to address the many serious concerns raised in the reconsideration petitions filed in the *Golden Globe Awards* proceeding, before prohibiting the use of additional words, the Commission falls short

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[12] *In re Infinity Radio License, Inc.*, Memorandum Opinion and Order, 19 FCC Rcd 5022, 5026 (2004).

[13] *In re Complaints Against Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, Memorandum Opinion and Order, 19 FCC Rcd 4975 (2004); *petitions for stay and reconsideration pending.*

of meeting the constitutional standard and walking the tightrope of a restrained enforcement policy.

This approach endangers the very authority we so delicately retain to enforce broadcast decency rules. If the Commission in its zeal oversteps and finds our authority circumscribed by the courts, we may forever lose the ability to protect children from the airing of indecent material, barring an unlikely constitutional amendment setting limitations on the First Amendment freedoms.

The perilous course taken today is evident in the approach to the acclaimed Martin Scorsese documentary, "The Blues: Godfathers and Sons." It is clear from a common sense viewing of the program that coarse language is a part of the culture of the individuals being portrayed. To accurately reflect their viewpoint and emotions about blues music requires airing of certain material that, if prohibited, would undercut the ability of the filmmaker to convey the reality of the subject of the documentary. This contextual reasoning is consistent with our decisions in *Saving Private Ryan*[14] and *Schindler's List*.[15]

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[14] *In the Matter of Complaints Against Various Television Licensees Regarding Their Broad. on November 11, 2004, of the ABC Television Network's Presentation of the Film, "Saving Private Ryan,"* Memorandum Opinion and Order, 20 FCC Rcd 4507, 4513 (2005) ("Deleting all [indecent] language or inserting milder language or bleeping sounds into the film would have altered the nature of the artistic work and diminished the power, realism and immediacy of the film experience for viewers."). *See also Peter Branton*, Letter by Direction of the Commission, 6 FCC Rcd 610 (1991) (concluding that repeated use of the f-word in a recorded news interview program not indecent in context).

[15] *In the Matter of WPBN/WTOM License Subsidiary, Inc.*, 15 FCC Rcd 1838 (2000).

The Commission has repeatedly reaffirmed, and the courts have consistently underscored, the importance of content *and* context. The majority's decision today dangerously departs from those precedents. It is certain to strike fear in the hearts of news and documentary makers, and broadcasters that air them, which could chill the future expression of constitutionally protected speech.

We should be mindful of Justice Harlan's observation in *Cohen v. California.*[16] Writing for the Court, he observed:

> [W]ords are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated.[17]

Given all of these considerations, I find that the Omnibus Order, while reaching some appropriate conclusions both in identifying indecent material and in dismissing complaints, is in some ways dangerously off the mark. I cannot agree that it offers a coherent, principled long-term framework that is rooted in common sense. In fact, it may put at risk the very authority to protect children that it exercises so vigorously.

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[16] 403 U.S. 15 (1971).

[17] *Id.* at 26 ("We cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process.").

STATEMENT OF COMMISSIONER DEBORAH TAYLOR TATE

Re: *Complaints Against Various Television Licensees Concerning Their February 1, 2004 Broadcast of the Super Bowl XXXVIII Halftime Show*, Forfeiture Order; *Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, Notices of Apparent Liability and Memorandum Opinion and Order; *Complaints Against Various Television Licensees Concerning Their December 31, 2004 Broadcast of the Program "Without A Trace"*, Notice of Apparent Liability for Forfeiture

Today marks my first opportunity as a member of the Federal Communications Commission to uphold our responsibility to enforce the federal statute prohibiting the airing of obscene, indecent or profane language.[1] To be clear—I take this responsibility very seriously. Not only is this the law, but it also is the right thing to do.

One of the bedrock principles of the Communications Act of 1934, as amended, is that the airwaves belong to the public. Much like public spaces and national landmarks, these are scarce and finite resources that must be preserved for the benefit of all Americans. If numbers are any indication, many Americans are not happy about the way that their airwaves are being utilized. The number of complaints filed with the FCC reached over one million in 2004. Indeed, since taking office in January 2006, I have received hundreds of personal e-mails from people all over this country who are unhappy

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[1] *See* 18 U.S.C. § 1464.

with the content to which they—and, in particular, their families—are subjected.

I have applauded those cable and DBS providers for the tools they have provided to help parents and other concerned citizens filter out objectionable content. Parental controls incorporated into cable and DBS set-top boxes, along with the V-Chip, make it possible to block programming based upon its content rating. However, these tools, even when used properly, are not a complete solution. One of the main reasons for that is because much of the content broadcast, including live sporting events and commercials, are not rated under the two systems currently in use.

I also believe that consumers have an important role to play as well. Caregivers—parents, in particular—need to take an active role in monitoring the content to which children are exposed. Even the most diligent parent, however, cannot be expected to protect their children from indecent material broadcast during live sporting events or in commercials that appear during what is marketed to be "appropriate" programming.

Today, we are making significant strides toward addressing the backlog of indecency complaints before this agency. The rules are simple—you break them and we will enforce the law, just as we are doing today. Both the public and the broadcasters deserve prompt and timely resolution of complaints as they are filed, and I am glad to see us act to resolve these complaints. At the same time, however, I would like to raise a few concerns regarding the complaints we address in these decisions.

First, I would like to discuss the complaint regarding the 6:30 p.m. Eastern Daylight Time airing of an episode

of *The Simpsons*. The *Order* concludes that this segment is not indecent, in part because of the fact that *The Simpsons* is a cartoon. Generally speaking, cartoons appeal to children, though some may cater to both children and adults simultaneously. Nevertheless, the fact remains that children were extremely likely to have been in the viewing audience when this scene was broadcast. Indeed, the marketing is aimed at children. If the scene had involved real actors in living color, at 5:30 p.m. Central Standard Time, I wonder if our decision would have been different? One might argue that the cartoon medium may be a more insidious means of exposing young people to such content. By their very nature, cartoons do not accurately portray reality, and in this instance the use of animation may well serve to present that material in a more flattering light than it would if it were depicted through live video. I stop short of disagreeing with our decision in this case, but note that the animated nature of the broadcast, in my opinion, may be cause for taking an even closer look in the context of our indecency analysis.

Second, our conclusion regarding the 9:00 p.m. Central Standard Time airing of an episode of *Medium* in which a woman is shot at point-blank range in the face by her husband gives me pause. While I agree with the result in this case, I question our conclusion that the sequence constitutes violence *per se* and therefore falls outside the scope of the Commission's definition of indecency. Without question, this scene is violent, graphically so. Moreover, it is presented in a way that appears clearly designed to maximize its shock value. And therein lies my concern. One of the primary ways that this scene shocks is that it leads the viewer to believe that

the action is headed in one direction—through dialogue and actions which suggest that interaction of a sexual nature is about to occur—and then abruptly erupts in another—the brutally violent shooting of a wife by her husband, in the head, at point-blank range. Even though the Commission's authority under Section 1464 is limited to indecent, obscene, and profane content, and thus does not extend to violent matter, the use of violence as the "punch line" of titillating sexual innuendo should not insulate broadcast licensees from our authority. To the contrary, the use of sexual innuendo may, depending on the specific case, subject a licensee to potential forfeiture, regardless of the overall violent nature of the sequence in which such sexual innuendo is used.

* * *

Finally, I would like to express my hope and belief that the problem of indecent material is one that can be solved. Programmers, artists, writers, broadcasters, networks, advertisers, parents, public interest groups, and, yes, even Commissioners can protect two of our country's most valuable resources: the public airwaves and our children's minds. We must take a stand against programming that robs our children of their innocence and constitutes an unwarranted intrusion into our homes. By working together, we should promote the creation of programming that is not just entertaining, but also positive, educational, healthful, and, perhaps, even inspiring.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 06-3575

CBS CORPORATION; CBS BROADCASTING INC.; CBS TELEVISION STATIONS, INC.; CBS STATIONS GROUP OF TEXAS L.P.; AND KUTV HOLDINGS, INC., PETITIONERS

v.

FEDERAL COMMUNICATION COMMISSION; UNITED STATES OF AMERICA, RESPONDENTS

On Petition for Review of Orders of the
Federal Communications Commission
FCC Nos. 06-19 and 06-68

Argued: Sept. 11, 2007

Before: SCIRICA, *Chief Judge*, RENDELL and FUENTES, *Circuit Judges*.

JUDGMENT

This cause came to be heard on the record from the Federal Communications Commission and was argued by counsel on September 11, 2007. On consideration whereof, it is now hereby

ORDERED and ADJUDGED by this Court that the petition for review is granted, the orders of the Federal Communications Commission are vacated, and the case is remanded for proceedings consistent with this opinion. Each party to bear their own costs. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ MARCIA M. WALDRON
MARCIA M. WALDRON
Clerk

DATED: July 21, 2008

APPENDIX E

1. 18 U.S.C. 1464 provides:

Broadcasting obscene language

Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both.

2. 47 U.S.C. 312 provides in relevant part:

Administrative sanctions

(a) Revocation of station license or construction permit

The Commission may revoke any station license or construction permit—

(1) for false statements knowingly made either in the application or in any statement of fact which may be required pursuant to section 308 of this title;

(2) because of conditions coming to the attention of the Commission which would warrant it in refusing to grant a license or permit on an original application;

(3) for willful or repeated failure to operate substantially as set forth in the license;

(4) for willful or repeated violation of, or willful or repeated failure to observe any provision of this chapter or any rule or regulation of the Commission authorized by this chapter or by a treaty ratified by the United States;

(5) for violation of or failure to observe any final cease and desist order issued by the Commission under this section;

(6) for violation of section 1304, 1343, or 1464 Title 18; or

(7) for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station, other than a non-commercial educational broadcast station, by a legally qualified candidate for Federal elective office on behalf of his candidacy.

(b) Cease and desist orders

Where any person (1) has failed to operate substantially as set forth in a license, (2) has violated or failed to observe any of the provisions of this chapter, or section 1304, 1343, or 1464 Title 18, or (3) has violated or failed to observe any rule or regulation of the Commission authorized by this chapter or by a treaty ratified by the United States, the Commission may order such person to cease and desist from such action.

* * * * *

3. 47 U.S.C. 503 provides in relevant part:

Forfeitures

* * * * *

(b) Activities constituting violations authorizing imposition of forfeiture penalty; amount of penalty; procedures applicable; persons subject to penalty; liability exemption period

(1) Any person who is determined by the Commission, in accordance with paragraph (3) or (4) of this subsection, to have—

(A) willfully or repeatedly failed to comply substantially with the terms and conditions of any license, permit, certificate, or other instrument or authorization issued by the Commission;

(B) willfully or repeatedly failed to comply with any of the provisions of this chapter or of any rule, regulation, or order issued by the Commission under this chapter or under any treaty, convention, or other agreement to which the United States is a party and which is binding upon the United States;

(C) violated any provision of section 317(c) or 509(a) of this title; or

(D) violated any provision of section 1304, 1343, or 1464 of Title 18; shall be liable to the United States for a forfeiture penalty. A forfeiture penalty under this subsection shall be in addition to any other penalty provided for by this chapter; except that this subsection shall not apply to any conduct which is subject to forfeiture under subchapter II of this chapter, part II or III of subchapter III of this chapter, or section 507 of this title.

* * * * *

4. Public Telecommunications Act of 1992, Pub. L. No. 102-356, § 16(a), 106 Stat. 949, provides:

> FCC REGULATIONS.—The Federal Communications Commission shall promulgate regulations to prohibit the broadcasting of indecent programming—
>
> (1) between 6 a.m. and 10 p.m. on any day by any public radio station or public television station that goes off the air at or before 12 midnight; and
>
> (2) between 6 a.m. and 12 midnight on any day for any radio or television broadcasting station not described in paragraph (1).
>
> The regulations required under this subsection shall be promulgated in accordance with section 553 of title 5, United States Code, and shall become final not later than 180 days after the date of enactment of this Act.

5. 47 C.F.R. 73.3999 provides:

> **Enforcement of 18 U.S.C. 1464 (restrictions on the transmission of obscene and indecent material).**
>
> (a) No licensee of a radio or television broadcast station shall broadcast any material which is obscene.
>
> (b) No licensee of a radio or television broadcast station shall broadcast on any day between 6 a.m. and 10 p.m. any material which is indecent.

Supreme Court, U.S.
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No. 08-653

IN THE

Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,
Petitioners,

v.

CBS CORPORATION, CBS BROADCASTING INC., CBS TELEVISION STATIONS, INC., CBS STATIONS GROUP OF TEXAS L.P., AND KUTV HOLDINGS, INC.,
Respondents.

On Petition for Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION

JONATHAN H. ANSCHELL
CBS BROADCASTING INC.
4024 Radford Avenue
Studio City, CA 91604

SUSANNA M. LOWY
CBS BROADCASTING INC.
51 West 52nd Street
New York, NY 10019

ROBERT CORN-REVERE
Counsel of Record
RONALD G. LONDON
AMBER L. HUSBANDS
DAVIS WRIGHT TREMAINE LLP
1919 Pennsylvania Ave., NW
Suite 200
Washington, D.C. 20006
(202) 973-4200

JEROME J. SHESTACK
WOLFBLOCK LLP
1650 Arch Street, 22nd Floor
Philadelphia, PA 19103
(215) 977-2000

Counsel for Respondents

LEGAL PRINTERS LLC, Washington DC • 202-747-2400 • legalprinters.com

QUESTION PRESENTED

Whether the Third Circuit correctly held that the Federal Communications Commission violated the Administrative Procedure Act, 5 U.S.C. § 551, *et seq.*, by refusing to acknowledge that it had retroactively implemented a fundamental change in its restrained enforcement policy for broadcast indecency when it imposed a $550,000 fine on the twenty CBS-owned television stations for the unauthorized and unintentional broadcast of a partially-covered female breast for nine-sixteenths of a second during the 2004 Super Bowl halftime show.

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Respondent CBS Broadcasting Inc. makes the following disclosure: CBS Corporation, a publicly held company, owns an interest of 10 percent or more in CBS Broadcasting Inc.

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PRELIMINARY STATEMENT

The Federal Communications Commission's ("FCC's") petition for writ of certiorari fails to present either a split in the circuit courts or an important issue of federal law that requires this Court's review of the decision below. The FCC's claim of "substantial overlap" between the Third Circuit's decision and *FCC v. Fox Television Stations, Inc.*, No. 07-582 (argued Nov. 4, 2008) falls far short of the mark. Although both cases share a common background of nearly thirty years in which the FCC expressly declined to find that fleeting, isolated, or inadvertent broadcasts may be found actionably indecent, the Third Circuit explained that that "here, unlike in *Fox*, the FCC has not offered *any* explanation – reasoned or otherwise – for changing its policy on fleeting images." Pet. App. 27a (emphasis added). There is no dispute whatsoever about the controlling legal standard – that an agency cannot refuse to explain a fundamental change in policy. *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 42-43 (1983).

Even if the Commission were correct that the legal question at issue here and in *Fox* is identical, there would be no reason for the Court to review the same issue a second time. The Third Circuit decision is supported by other unique and independent grounds – which the FCC does not challenge through its petition for certiorari – such as that court's rejection of the FCC's multiple theories for finding CBS culpable for the broadcast at issue. Among other things, the Third Circuit held that the FCC did not establish the element of scienter, and that CBS could not be held liable on a theory of

respondeat superior for the actions of Janet Jackson and Justin Timberlake that led to the unforeseen exposure of Ms. Jackson's breast for approximately one-half of a second. Thus, the Third Circuit ruled on a unique factual record, arising from circumstances that had never arisen before and are extremely unlikely to arise again. Consequently, the Court should deny the petition without delay.

STATEMENT OF THE CASE

A. The FCC's Restrained Enforcement Policy

1. For almost 30 years the FCC held consistently that isolated, fleeting, or unintentional broadcasts of allegedly indecent material were not actionable under rules adopted pursuant to 18 U.S.C. § 1464. When the Commission first articulated a definition of the statutory term "indecent," it consciously adopted a cautious approach to enforcement to avoid First Amendment transgressions. *A Citizen's Complaint Against Pacifica Found. Station WBAI(FM), New York, N.Y.*, 56 F.C.C.2d 94, 103-04 (1975) (*"FCC Pacifica Order"*) (concurring statement of Commissioners Robinson and Hooks) ("the statute ... on its face expresses no limit on our power to forbid 'indecent' language over the air, [but] the First Amendment does not permit us to read the statute broadly").

The FCC decided more than three decades ago that an indecency complaint would not be "actionable" for purposes of Section 1464 unless the licensee purposefully engaged in repeated and intentional presentations of indecent material. *See Petition for Reconsideration of a Citizen's Complaint Against Pacifica Foundation Station WBAI (FM)*, 59 F.C.C.2d 892, 893 n.1 (1976) (*"Pacifica Reconsideration Order"*). It explained that

inadvertent, isolated or fleeting transmissions of "indecent" language do not violate the law because it would be inequitable to hold a licensee responsible when "public events likely to produce offensive speech are covered live, and there is no opportunity for journalistic editing." *Id.* at 892. The FCC expressly defended the indecency rules in this Court using the same reasoning, arguing that the decision to craft an indecency standard based on a broadcast of a George Carlin monologue entitled "Filthy Words" must be "read narrowly, limited to the language 'as broadcast.'" *See* Brief for Federal Communications Commission, *FCC v. Pacifica Found.*, No. 77-528 (Mar. 3, 1978), 1978 WL 206838 at 25-26 (citation omitted). The FCC emphasized "the deliberate repetition of these words," noting that the case involved "prerecorded language with the words repeated over and over [and] deliberately broadcast." *Id.*

2. This Court took the Commission at its word and narrowly upheld the decision on the expressly limited basis the agency advocated. *FCC v. Pacifica Found.*, 438 U.S. 726, 742 (1978); *see id.* at 733 n.7 (citing *Pacifica Reconsideration Order*). Justice Powell explained that the Court approved "only the Commission's holding that Carlin's monologue was indecent 'as broadcast'" and "not the broad sweep of the Commission's opinion." *Id.* at 755-56 (Powell, J., concurring). In particular, he explained that "[t]he Commission's holding, and certainly the Court's holding today, does not speak to cases involving the isolated use of a potentially offensive word." *Id.* at 760-61. *See also id.* at 777 (Brennan J., dissenting).

Describing the context of a broadcast as all-important, this Court in *Pacifica* focused on the "specific *factual* context" of the FCC's indecency

decision regarding the George Carlin monologue. *Pacifica*, 438 U.S. at 742 (quoting *Pacifica Reconsideration Order*) (emphasis added). In this regard, the Court identified the same three contextual factors that were emphasized in the FCC's decision and in its brief: (1) the broadcast involved "prerecorded language;" (2) the offensive words were "repeated over and over;" and (3) the offensive matter was "deliberately broadcast." *Id.* at 732 (quoting *FCC Pacifica Order*, 56 F.C.C.2d at 99). Although the Court briefly mentioned other contextual factors (*e.g.*, whether the case involved "a two-way radio conversation between a cab driver and a dispatcher, or a telecast of an Elizabethan comedy"), it did so only to the extent the content of the program, like the time of day of the broadcast, might affect "the composition of the audience." *Pacifica*, 438 U.S. at 750. This Court's majority opinion never suggested that the FCC may use "context" as a subjective factor to adjudicate indecency based on a program's "social value" or "capacity to offend."[1]

3. Based on the cautious policy it articulated and the narrow holding in *Pacifica*, the FCC consistently declined to find violations of its rules in cases involving the fleeting, unintentional, or inadvertent broadcast of allegedly indecent words or images. In its first opportunity to apply the Court's decision, for example, the agency rejected a

---

[1] Only three Justices joined Section IV.B of the opinion. *Id.* at 744-48. A majority of the Justices expressly declined to empower the FCC to make *ad hoc* content-based judgments about the relative merits or probable offensiveness of programs by reference to "context." *See Pacifica*, 438 U.S. at 761 (Powell, J., concurring); *id.* at 762-63 (Brennan, J., dissenting).

television station license challenge on indecency grounds, rejecting a petition against the licensee that contained lengthy descriptions of "objectionable" programs including some that depicted nudity characterized as "offensive, vulgar and otherwise ... harmful to children." *See WGBH Educ. Found.*, 69 F.C.C.2d 1250, 1250 (1978). In particular, the complaint singled out one program that relied "primarily on scatology, immodesty, vulgarity, nudity, profanity and sacrilege for 'humor,'" as well as "other programs which allegedly contain nudity and/or sexually-oriented material." *Id.* The Commission, honoring "the narrowness of the *Pacifica* holding," declined to find a violation of the rules where the allegedly indecent words and images were not "repeated over and over as a sort of verbal shock treatment." *Id.* at 1251, 1254.

For almost a decade after *Pacifica*, the FCC strictly limited its enforcement of Section 1464 to the exact "seven dirty words" in Carlin's monologue and nothing else. In 1987, however, in a series of cases involving allegedly indecent radio broadcasts, the Commission found that the "generic definition" articulated in its original *Pacifica Order* could properly be applied to broadcast expression beyond the seven specific words made famous by George Carlin.[2] In so doing, the Commission reaffirmed the requirement of a restrained approach that "Section 326 and the First Amendment dictate." *Infinity*

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[2] *See Pacifica Found., Inc.*, 2 FCC Rcd. 2698, 269, *aff'd on recon., Infinity Broad. Corp. of Pa.*, 3 FCC Rcd. 930 (1987), *aff'd in part, rev'd in part, Action for Children's* Television *v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988) ("*ACT I*"). *See also Regents of the Univ. of Cal.*, 2 FCC Rcd. 2703 (1987) (same subsequent history); *Infinity Broad. Corp. of Pa.*, 2 FCC Rcd. 2705 (1987) (same subsequent history).

Broad. Corp. of Pa., 2 FCC Rcd. at 2705. On review, the D.C. Circuit affirmed the "generic definition" for construing Section 1464, but also expressly reinforced the First Amendment principles that limit the statute's scope. Then-Judge Ruth Bader Ginsburg wrote that "the potential chilling effect of the FCC's generic definition ... will be tempered by the Commission's restrained enforcement policy." *ACT I*, 852 F.2d at 1340 n.14 (citing *Pacifica*, 438 U.S. at 761 n.4 (Powell, J., concurring)).

The Commission staff routinely applied the "generic definition" of indecency to dismiss complaints against broadcasts that allegedly contained brief images of nudity.[3] The record in this case included seven informal staff decisions issued between October 1989 and August 1992 dismissing such complaints as "not actionably indecent." Pet. App. 31a-32a. Conversely, in 1988, the FCC announced a Notice of Apparent Liability ("NAL") for the broadcast of a movie that depicted explicit nudity and sexual activity, finding apparent liability because, it said, the "scenes were neither isolated nor fleeting." *KZKC(TV), Kansas City Mo, Apparently Liable for $2,000 Fine for Indecent Broadcast*, Report No. MM-328 (June 23, 1988). That NAL was later rescinded after the D.C. Circuit held in *ACT I* that the FCC had failed to articulate a reasoned basis for its "safe harbor" period, which defines the time of day when children are not likely to be in the audience and when broadcasters may air indecent material. *Kansas City Television, Ltd. (KZKC-TV)*, 4 FCC Rcd. 6706 (1989). *See ACT I*, 852 F.2d at 1343 n.18; *Action for Children's Television v.*

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[3] At this time, the vast majority of indecency complaints were decided on delegated authority by the FCC staff.

FCC, 932 F.2d 1504, 1509-10 (D.C. Cir. 1991) ("*ACT II*").

4. The FCC maintained its cautious enforcement policy regarding fleeting or inadvertent broadcasts until March 2004 – six weeks after the Super Bowl broadcast at issue in this case – when it first expressly abandoned it in *Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 19 FCC Rcd. 4975 (2004) ("*Golden Globe Awards*"). The Commission later vacillated over whether it had actually changed its policy, *Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, 21 FCC Rcd. 13,299, 13,306 (2006) ("*Omnibus Order*") (describing prior policy as being "based largely on staff letters and dicta"), but ultimately defended its decision by acknowledging it consciously had made a change. *See* Brief for Federal Communications Commission and United States, *Fox Television Stations v. FCC*, No. 06-1760, at 19 (2d Cir. Dec. 6, 2006). However, in *Fox Television Stations v. FCC*, 489 F.3d 444, 458 (2d Cir. 2007), the Second Circuit held that the Commission "provide[d] no reasonable explanation for why it has changed its perception that a fleeting expletive was not a harmful 'first blow' for the nearly thirty years between *Pacifica* and *Golden Globes*." The court also expressed doubt about the FCC's ability to satisfy constitutional concerns. With respect to the First Amendment issues, the Second Circuit, in *dictum*, expressed sympathy with "the Networks' contention that the FCC's indecency test is undefined, indiscernible, inconsistent, and consequently, unconstitutionally vague." *Id.* at 463.

B. The Decisions Below

The Third Circuit decision that the Commission asks this Court to review vacated a $550,000 fine imposed on CBS for violating 18 U.S.C. § 1464. The FCC imposed the fine despite the undisputed findings in the record below that CBS did not plan, authorize or approve the unscripted stunt that resulted in the exposure of Janet Jackson's breast for 9/16 of a second at the end of the 2004 Super Bowl halftime show. Citing what it described as "an unprecedented number of complaints," the Commission issued an NAL concluding that the exposure, despite its brief nature, "was designed to pander to, titillate and shock," and that the broadcast was willful under 47 U.S.C. § 503(b)(1). The NAL proposed a then-maximum $27,500 fine for each of 20 CBS-owned stations.

The FCC issued an order affirming the forfeiture, over CBS's opposition on constitutional and statutory grounds, holding it was irrelevant that CBS did not intend to air any nudity. The order held CBS acted "willfully" because it was liable for the performers' conduct under the doctrine of *respondeat superior*, and it rejected CBS's arguments that the forfeiture was inconsistent with FCC indecency policy and violated the First Amendment. CBS sought reconsideration, but the FCC reaffirmed the $550,000 fine and again rejected all constitutional claims.

On CBS's petition for review, the Third Circuit vacated and remanded the forfeiture order. The court found that the FCC's consistent enforcement policy had been to treat both fleeting or unintentional words and images as "not actionably indecent." Pet. App. 9a, 18a. It rejected FCC claims

that pre-*Golden Globe* precedent put broadcasters like CBS on notice that even isolated or fleeting indecent material could be actionable, and that its policy on fleeting or isolated material applied solely to expletives. Pet. App. 18a-23a, 28a-29a, 37a. Consequently, the Third Circuit held that the decision to impose a forfeiture on CBS was an unexplained departure from prior FCC policy.

In view of this policy change, the court held that fining CBS for approximately a half-second of nudity during a live halftime show constituted arbitrary and capricious agency action because the FCC "failed to even acknowledge" the departure, "let alone supply a reasoned explanation" for it.[4] The court held that "unlike in *Fox*, the FCC has not offered any explanation – reasoned or otherwise – for changing its policy," and instead claims that "no policy change occurred when it [held] the Halftime Show[] ... actionably indecent." Pet. App. 27a. The court rejected the FCC's "reading of [its] policy on fleeting material ... untenable" and held that its "unsubstantiated contentions in this regard contradict the lengthy history of ... restrained enforcement policy." Pet. App. 20a-21a.

The Third Circuit held that its APA finding was sufficient to vacate the forfeiture. It also rejected

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[4] Pet. App. 27a. The court also was skeptical about the Commission's assertion of an "unprecedented number" of complaints regarding the broadcast. The Third Circuit found the record "unclear on the actual number" especially given CBS's showing that of over 542,000 complaints the FCC claimed to have received, over 85 percent were form letters from single-interest advocacy groups, and approximately 20 percent were duplicates, with some found in the record up to 37 times. Pet. App. 3a n.2.

the FCC's application of *respondeat superior* and its attempts to impose nondelegable duties and/or strict liability on CBS. It concluded that broadcasters cannot be vicariously liable for speech or expression of independent contractors because the First Amendment requires scienter to impose liability. The court remanded the case to the Commission to determine the correct standard for "willfulness" with the understanding that "[f]urther action by the Commission would be declaratory in nature, as the agency may not retroactively penalize CBS." Pet. App. 80a.

Judge Rendell issued an opinion concurring in part and dissenting in part. She wrote that the majority's discussion of scienter in *dictum* was unnecessary, and took issue with the need for a remand. Pet. App. 81a-82a.

REASONS FOR DENYING THE PETITION

I. THE DECISION BELOW PRESENTS NO ISSUE FOR WHICH REVIEW BY THIS COURT IS NEEDED

A. There is No Issue that Justifies Granting Certiorari

1. This case presents no dispute on any question of law that would justify granting the FCC's petition for certiorari. The FCC does not allege any conflict among Circuits here, nor does it identify any important question of federal law that must be settled by this Court. Rather, it argues only that the Third Circuit "erroneously construed the Commission's policies on broadcast indecency." Pet. 13. The Commission does not allege that the Third Circuit misstated the applicable standard, merely that it misapplied it. Pet. 18. However, it is well-

settled that this is not a basis for review by this Court. Sup. Ct. R. 10. *See Rice v. Sioux City Mem'l Park Cemetery*, 349 U.S. 70, 79 (1954).

2. The FCC's argument that there is "substantial overlap" between this case and *Fox* provides no reason to grant the petition, for it misconstrues the legal question at issue. Although the FCC's formerly restrained indecency enforcement policy provides a common backdrop for both cases, the question in *Fox* is whether the Commission's explanation of an *acknowledged* change in policy was sufficient, while the question here is whether the FCC changed its policy *at all* prior to the broadcast under review. Pet. 10. The difference between the Commission's posture in the two cases ("our explanation was sufficient" versus "we need no explanation") is critical, for there is no dispute whatsoever about the controlling law. As the Third Circuit held, "the FCC's policy change must be set aside as arbitrary and capricious, because it has failed to even acknowledge its departure from its former policy let alone supply a 'reasoned explanation' for the change." Pet. App. 27a. Further review thus would be futile, because the Commission's appellate lawyers cannot now supply an explanation that the agency failed to give. *State Farm*, 463 U.S. at 50 ("[T]he courts may not accept appellate counsel's *post hoc* rationalizations for agency action. It is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself.") (internal citations omitted). Accordingly, a decision on the APA issue presented in *Fox* does not control the outcome of this case.

Moreover, review would be unwarranted even if the FCC is correct in its claim that the issue

presented here is the same as in *Fox*. Indeed, the petition should be denied *especially if the issue presented is identical*, since this Court already is considering in *FCC v. Fox* whether the FCC may change its policy toward fleeting material based on the agency's explanation in the orders at issue in that case. Nothing would be gained by granting the petition to consider the same question twice, nor would doing so alter the practical outcome of the decision below. Although the Commission seeks review so that it may "enforce the sanctions it levied against CBS," Pet. 14, the Commission expressly declined to seek review of another issue necessary to that goal – the requirement of showing scienter. Pet. 23 n.3; Pet. App. 39a. Separately from the APA finding, the Third Circuit rejected the FCC's myriad and shifting rationales for imposing liability on CBS for the performers' actions. Pet. App. 39-79a (rejecting the FCC's three theories of liability). The Commission's assertion that it "would be free to impose a forfeiture on remand," Pet. 23 n.3, fails to take into account the Third Circuit's unchallenged finding that "[t]he scienter element of the indecency provisions – as a constitutional requirement – is paramount." Pet. App. 73a. Consequently, there is no reason to put off a decision on the petition until a decision is rendered in *Fox*, and the Court should deny the petition without delay.

3. The Third Circuit's decision does not "call[] into question key aspects of the Commission's broadcast-indecency enforcement regime," as the FCC asserts. Pet. 20. The Commission cannot claim in this case, as it did in *Fox*, that the decision below placed a constitutional cloud over its enforcement

authority in order to obtain review by this Court.[5] The Third Circuit opinion did not address the constitutional arguments regarding fleeting images in dictum or otherwise, so the Commission is precluded from making the same argument here.

In this regard, the Commission's argument that the Third Circuit's decision has deterred it from making a policy change or enforcing its indecency rules must be viewed skeptically. Nothing has prevented the Commission from taking action "with respect to any of the numerous pending complaints involving the broadcast of brief images" that it claims are pending.[6] The FCC does not indicate how many complaints it is holding, whether they also

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[5] In seeking certiorari in *Fox*, the FCC argued that the Second Circuit's constitutional analysis, set forth as *dictum*, "effectively nullifie[d] the Commission's prohibition on indecent language," rendering remand for additional explanation illusory. Br. in Supp. of Pet. for Cert., *FCC v. Fox*, No. 07-582, at 15, 29 (describing remand as "a Sisyphean errand"). However, after it obtained review, the Commission changed its position to contend that the broadcasters were "precluded from raising their constitutional challenges in this Court," and that the Second Circuit's analysis was nothing more than "dicta." Br. of Petitioners, *FCC v. Fox*, No. 07-582, at 42, 43.

[6] Pet. 20. For example, nearly five years ago, after the FCC issued an NAL for the broadcast of fleeting nudity in *Young Broadcasting*, the licensee filed an extensive opposition arguing, among other things, that the proposed forfeiture violated the Commission's established policy against penalizing such accidental and fleeting broadcasts. *Response to Notice of Apparent Liability for Forfeiture of Station KRON-TV*, File No. EB-02-IH-0786 (Feb. 26, 2004) at 20-29. The Commission never responded to the opposition, and let the NAL lapse without taking further action, which is now time-barred. 28 U.S.C. § 2462 (establishing a five year statute of limitations for forfeitures).

may be barred by the statute of limitations, or whether the circumstances in a given case would counsel against imposing any penalty.[7] For the same reason, the Court should not base its decision to accept review on the extreme hypotheticals posed by the petition as to what broadcasters might or might not do if the formerly restrained enforcement policy is kept in place. Pet. 21. *See Pacifica*, 438 U.S. at 734-35.

The Commission's complaint that the decision below is deterring it from deciding other indecency cases rings quite hollow when the real issue is that the FCC simply has failed to act or explain its rationale in case after case. Granting review here would only make matters worse, by deferring the Commission's obligation to squarely address the administrative law and constitutional issues presented in the remand proceeding ordered by the Third Circuit. Certiorari is not to be used as a tactic to assist the FCC in its dereliction of statutory and constitutional duties.

B. The Third Circuit Decision is Correct

Like the Third Circuit, this Court should reject the "troublesome revisionist arguments" the FCC has employed "to avoid the implications of its own fleeting indecency policy." Pet. App. 36a-37a. In its petition, the Commission argues that the Third Circuit should have deferred to the Commission's interpretation of its prior decisions under

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[7] Because the Third Circuit found that the Commission's treatment of words and images has been indistinguishable, App. 28a-29a, the only pending complaints that supposedly are "in question" due to the decision in this case are those involving broadcasts that occurred before the March 2004 *Golden Globe Awards* order.

established principles of administrative law, and that the court erred by focusing on the Commission's broad analytical framework for evaluating broadcast indecency "which applies equally to words and images, rather than on the agency's specific statements regarding fleeting material." Pet. 13, 18. However, the Third Circuit's decision reviewed in detail the Commission's decisions regarding fleeting material – including fleeting images – and correctly found that the FCC's interpretation was "counter to the evidence before the agency," and "so implausible that it could not be ascribed to a difference in view or the product of agency expertise." Pet. App. 37a-38a (quoting *State Farm*, 463 U.S. at 43).

1. The Commission's claim that "the court relied on a purported 'fleeting images' exemption to indecency enforcement that never existed," Pet. 13, is premised on a demonstrably false assertion of fact – that "none of the prior administrative decisions that the court surveyed had exempted a brief image from indecency enforcement." *Id.* This statement ignores the Commission's order in *WGBH*, the first decision following *Pacifica*, where the agency rejected petitions to deny based on programs containing brief nudity and profanity. *See* Pet. App. 29a-31a. Additionally, the Third Circuit examined a series of staff decisions issued over a four year period dismissing complaints for fleeting images of nudity, and found that they illustrated that the FCC's policy toward fleeting words and images had been identical. Pet. App. 31a-32a.

The petition buries its discussion of these cases in a footnote, claiming that the decision in *WGBH* is not "significant" because the Commission did not specifically discuss "nudity," and the staff letters do

not "bind" the Commission.[8] However, there would have been no reason for the FCC in *WGBH* to separately analyze complaints about nudity because, as the Third Circuit found, "the Commission's analysis illustrates that 'words' and 'depictions' were treated identically for purposes of determining whether a broadcast was actionably indecent." Pet. App. 30a n.14. More significant is the fact that the Commission expressly relied on the policy of restraint articulated in *Pacifica*. *WGBH Educ. Found.*, 69 F.C.C.2d at 1254. The staff dismissal letters also are significant because they substantiate the Commission's established policy immediately after it adopted its generic approach to indecency in 1987.[9] The Third Circuit did not suggest that the Commission was somehow "bound" by prior staff decisions, but concluded only that the informal rulings demonstrated what the policy was and what the staff understood it to be.[10]

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[8] Pet. 19 n.2. The petition notes that the Third Circuit recognized that the staff dismissals were on "identical form letters" that merely announced summary dismissals finding the complaints "not actionably indecent." But the Third Circuit nevertheless found that the letters reflected established Commission policy. Pet. App. 32a.

[9] If the Commission had adopted a different policy toward fleeting images as the petition argues, the staff would not have been able to dismiss the complaints. For years, the FCC issued the vast majority of its indecency decisions – and virtually all of the dismissals – as informal letter rulings. Under the FCC's rules, subordinate officials are not authorized to act on "[m]atters that present novel questions of law, fact, or policy that cannot be resolved under existing precedents and guidelines." 47 C.F.R. § 0.283(c) (Media Bureau delegation); *id.* § 0.311(a)(3) (Enforcement Bureau delegation).

[10] Pet. App. 29a-30a. The Petition's citation of *Comcast Corp. v. FCC*, 526 F.3d 763 (D.C. Cir. 2008), is therefore beside

2. The Commission is unable to cite any case in which it actually explained that images were to be analyzed differently from words prior to this one, so the petition plucks two sentences from prior FCC orders – one from an older decision involving radio (which, given the audio-only nature of the medium, obviously did not involve images), and another from a policy statement – and claims that the policy was implicit in its dictum. Pet. 15-16. However, the Third Circuit correctly rejected these interpretations of precedent as "strained." Pet. App. 36a. As the court below found, the FCC "acknowledge[d] it had never explicitly distinguished between images and words for the purpose of defining the scope of actionable indecency," but contended only that "the existence of such a distinction was obvious, if unstated." *See* Pet. App. 28a.

a. The Commission's reliance on *Pacifica Found., Inc.*, 2 FCC Rcd. at 2699, is misplaced. That case helped establish the "generic" indecency policy but did not address the issue of "images" because it involved a radio broadcast. *See* Pet. 15. It was one of three declaratory orders issued on the same day that held only that the indecency definition applied to "a broader range of material than the seven specific words at issue in *Pacifica*." *Id.* The Commission did not purport to alter the indecency standard, but decided only to use the seven words of the Carlin monologue as "examples of, rather than a

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the point. Even if not bound by Bureau or similar lower-level orders, the Commission still must acknowledge changes from such decisions and explain the departure. *Community Care Found. v. Thompson*, 318 F.3d 219, 227 (D.C. Cir. 2003) (cited in *Comcast*, 526 F.3d at 769); *Ventura Broad. Co. v. FCC*, 765 F.2d 184, 193 (D.C. Cir. 1985).

definitive list of, the kinds of words" that may be considered indecent. *Pacifica Found., Inc.*, 2 FCC Rcd. at 2699. Each of the orders involved repeated and intentional broadcasts of material that the Commission deemed to be indecent under its newly fashioned generic standard, and did not purport to articulate a different regulatory approach for "depictions or descriptions" as distinguished from "expletives." The orders reaffirmed the principle that "deliberate and repetitive use in a patently offensive manner is a requisite to a finding of indecency." *Infinity Broad. Corp. of Pa.*, 2 FCC Rcd. at 2705. *See Infinity Broad. Corp. of Pa.*, 3 FCC Rcd. at 931 ("our application of Section 1464 must be consistent with the constitutional principles derived from the *Pacifica* decision").

If *Pacifica Found., Inc.* "made clear" that only fleeting words were non-actionable (and not images) as the petition now argues, Pet. 15, it is mysterious that the Commission did not cite it in the decisions below. Among the NAL, the Forfeiture Order, and the Reconsideration Order below, *there is not a single reference* to the decision that the FCC now identifies as a principal source of its authority for a purported distinction between expletives and all other indecency. The Commission first reinterpreted *Pacifica Found., Inc.* as setting forth a different standard for "expletives" versus "descriptions" in late 2006, in the *Omnibus Order*, 21 FCC Rcd. at 13,306-07. Yet, in the space of a few paragraphs, the agency itself rejected the newly discovered dichotomy, saying it is "artificial and does not make sense." *Id.* at 13,308. Accordingly, the Third Circuit properly found that "before *Golden Globes*, [the FCC] had not distinguished between categories of broadcast material such as images and words." Pet. App. 22a.

b. The Commission also cites language from its *2001 Policy Statement* as articulating a "distinction between expletives and other types of indecent material." Pet. 16. The Third Circuit noted that "the Commission points to one sentence" in the policy statement that "relatively fleeting references may be found to be indecent where other factors contribute to a finding of patent offensiveness," but found that "when read in its original context rather than as an isolated statement, this sentence does not support the Commission's assertion here." Pet. App. 19a. Neither the *2001 Policy Statement* nor the staff decisions cited therein articulated any different approach for images versus words. *See Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency*, 16 FCC Rcd. 7999, 8008-09 (2001) ("*2001 Policy Statement*").

c. The Commission ultimately points to the Commission's aborted decision in *Young Broadcasting of San Francisco, Inc.*, 19 FCC Rcd. 1751 (2004), a case which was decided a few days before the halftime event that is the subject of the petition and which was allowed to die under the five-year statute of limitations. The Commission claims that *Young Broadcasting* should remove "[a]ny remaining doubt about the FCC's policy." Pet. 16. It is exceedingly, odd, however, for the FCC to attach such significance to the case when it never issued a final order after the licensee opposed the NAL. Further action is now barred by the statute of limitations. As a consequence, *Young Broadcasting* is not a final order and does not constitute binding FCC precedent.

Moreover, the NAL in *Young Broadcasting* never once suggested fleeting images should be treated differently from fleeting words. Rather, it expressly applied its body of case law involving fleeting language and held only that other fleeting references cases were "distinguishable because there was no finding that the material, in context, was pandering, titillating or intended to shock the audience." *Young Broadcasting*, 19 FCC Rcd. at 1755 n.35. *See* Pet. App. 33a. The petition suggests that the absence of an explanation of a policy change in *Young Broadcasting* must be taken as proof that, at some point in the past, the Commission *must* have made its policy clear, Pet. 17, but such sleight of hand is not supported by law. *E.g.*, *NCTA v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (policy reversal is "arbitrary and capricious" under the APA unless "the agency adequately explains the reasons for a reversal of policy"). In any event, it is not the court's obligation to explain why "the dog . . . didn't bark." *Cf. Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 63 (2004).

The Third Circuit provided a detailed analysis of *Young Broadcasting* and properly concluded that the case is "best understood as the Commission's initial effort to abandon its restrained enforcement policy on fleeting material." Pet. App. 33a-36a. Although the petition criticizes the court for relying on "the Commission's broad analytical framework for evaluating broadcast indecency" rather than particular decisions relating to fleeting broadcasts, Pet. 18, the court closely analyzed the reasoning of *Young Broadcasting* as well as the precedent on which it rested. Its analysis is sound and should not be disturbed.

d. Contrary to the government's suggestion, Pet. 19, the FCC has never used the aphorism "one picture is worth a thousand words" in its indecency decisions and therefore cannot rely on it now as an explanation of the agency's rationale. *State Farm*, 463 U.S. at 50. Moreover, the Commission's assertion that the decision below somehow is "at odds" with the Third Circuit's "recognition" of this concept is both irrelevant and wrong. Contrary to the Commission's argument, the Third Circuit has specifically rejected claims that "videotape evidence and other forms of evidence" have some special impact and should be treated differently. *United States v. Criden*, 648 F.2d 814, 816, 829 (3d Cir. 1981); *United States v. Martin*, 746 F.2d 964 (3d Cir. 1984). If anything, this line of cases provides an additional reason to deny review in this case.

3. In sum, the Third Circuit's careful and detailed analysis of the Commission's decision is entirely consistent with established principles of administrative law. The court was not required to defer to the Commission's interpretation of precedent, for, as the Third Circuit explained, "deference is inappropriate where the agency's proffered interpretation is capricious." Pet. App. 21a. *See Cassell v. FCC*, 154 F.3d 478, 483 (D.C. Cir. 1998). Additionally, as set forth in more detail below, deference is inappropriate where an agency's interpretation of its governing statute would raise grave constitutional concerns. *E.g., Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 574-75 (1988). Accordingly, there is no issue that merits review by this Court and the petition should be denied.

II. THE DOCTRINE OF CONSTITUTIONAL AVOIDANCE STRONGLY SUPPORTS DENIAL OF THE PETITION

Although First Amendment arguments were briefed extensively below, the Third Circuit was able to decide the case without addressing the constitutional issues. Resolving the case narrowly in this manner comports with the doctrine of constitutional avoidance – the "fundamental and longstanding principle of judicial restraint requir[ing] that courts avoid reaching constitutional questions in advance of the necessity of deciding them." *Lyng v. Northwest Indian Cemetery Prot. Ass'n*, 485 U.S. 439, 445 (1988) (citing, *inter alia*, *Ashwander v. TVA*, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring)). *See Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11 (2004). However, the FCC seeks review by this Court in the hope of winning a remand to the Third Circuit, and, eventually, "enforc[ing] the sanctions it levied against CBS." Pet. 14. Granting such review necessarily would entail constitutional adjudication, both as part of a more extensive APA analysis and because of the need ultimately to resolve the merits of the First Amendment challenge.

The Third Circuit avoided constitutional issues because it found, as a threshold matter, that the Commission in this case offered no explanation at all for its policy change. However, where an agency seeks to explain a change in policy that has inherent constitutional implications, the sufficiency of the explanation must be measured by how it addresses those ramifications. This is because the APA requires a determination of whether the agency action was "in accordance with law," including the Constitution. *See* 5 U.S.C. § 706(2)(A), (B)

(reviewing courts "hold unlawful and set aside agency action ... found to be ... arbitrary, capricious, ... or otherwise not in accordance with law," or "contrary to constitutional right, power, privilege, or immunity"). This Court's unanimous decision in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 414 (1971), made clear that "[a]gency action is arbitrary and capricious if [it] fail[s] to meet ... constitutional requirements." *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. Ruckelshaus*, 719 F.2d 1159, 1164 (D.C. Cir. 1983) (citing *Citizens to Preserve Overton Park*, 401 U.S. at 414). In APA review, "[i]t is not ... necessary to resolve whether [an agency's standard] violates the First Amendment" but rather, reversal is appropriate if it "raises difficult constitutional issues about ... First Amendment rights" because, "when an interpretation raises such constitutional concerns, the [agency] is not entitled to deference." *Allentown Mack Sales & Serv. v. NLRB*, 522 U.S. 359, 387-88 (1998) (Rehnquist, C.J., dissenting in part). *See also Solid Waste Agency v. United States Army Corps of Engrs.*, 531 U.S. 159, 173-74 (2001).[11]

The interrelationship between APA review and First Amendment analysis is particularly strong for the FCC, because it is empowered to regulate constitutionally-protected speech. The Communications Act charges the Commission with regulating under a "public interest standard [that] necessarily

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[11] This merely recognizes the basic rule that agencies are obligated to avoid statutory interpretations that raise grave constitutional questions. *Jones v. United States*, 529 U.S. 848, 857 (2000). *See also United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916) ("statute must be construed ... to avoid not only the conclusion [ ] it is unconstitutional, but also grave doubts upon that score").

invites reference to First Amendment principles." *FCC v. National Citizens Comm.*, 436 U.S. 775, 795 (1978) (quoting *CBS v. DNC*, 412 U.S. 94, 122 (1973)). Thus, as a general proposition, the FCC must "walk a 'tightrope'" to avoid statutory interpretations that intrude on First Amendment values. *CBS v. DNC*, 412 U.S. at 117. This obligation applies with particular force to the Commission's indecency rules that involve direct content regulation. *Pacifica*, 438 U.S. at 736-37; *2001 Policy Statement*, 16 FCC Rcd. at 7999, 8000. As this Court has made clear, the FCC may only regulate indecent expression "in a way consistent with First Amendment principles." *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 827 (2000).

The Third Circuit's conclusion, that "the Commission fail[ed] to acknowledge that it has changed its policy on fleeting material," Pet. App. 38a, did not require it to analyze whether the new approach to ephemeral material would create "grave constitutional concerns" or if it would violate the First Amendment.[12] Granting the FCC's petition, on the other hand, would require this Court in the first instance to determine whether the Commission's decision creates significant tension with applicable constitutional principles. Additionally, before the FCC would be permitted to "enforce the sanctions it levied against CBS," Pet. 14, a reviewing court also

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[12] The Third Circuit's general statement that the FCC's authority to regulate broadcast content is "constitutionally permissible," Pet. App. 10a, was merely part of a recitation of existing law, and did not purport to evaluate the constitutionality of a change in the restrained enforcement regime.

would have to go beyond the APA issue and rule on the substantive First Amendment claims raised below.[13]

In the proper case, a thorough review of the constitutionality of the FCC's indecency enforcement regime may well be justified, particularly given the vast changes in technology and the significant developments in the law since the 1978 *Pacifica* decision.[14] However, it is not necessary in this case for the Court to consider the constitutionality of Section 1464, or of its specific application to fleeting images. The Third Circuit's narrow decision best serves the doctrine of constitutional avoidance, and review by this Court is unnecessary.

CONCLUSION

The petition for a writ of certiorari should be denied because it presents neither a split in the circuit courts nor an important issue of federal law that requires this Court's review. Further, the Third Circuit decision below decided the case without addressing the constitutional issues, and granting the petition necessarily would entail constitutional

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[13] However, if this Court were to grant this petition, making adjudication of the constitutional questions unavoidable, then it should consider the First Amendment challenges directly, rather than initiating prolonged multi-stage review. *Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355, 364 (1999) (a prevailing party may "defend [the] judgment on any ground properly raised below").

[14] *See, e.g.*, *Ashcroft v. ACLU*, 542 U.S. 564 (2004); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002); *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803 (2000); *Reno v. ACLU*, 521 U.S. 844 (1997); *Denver Area Educ. Telecomms. Consortium v. FCC*, 518 U.S. 727 (1996); *Sable Commc'ns of Cal. v. FCC*, 492 U.S. 115 (1989).

adjudication by this Court in conflict with the doctrine of constitutional avoidance. There is no reason to delay consideration of the petition, and it should be promptly denied.

Respectfully submitted.

JONATHAN H. ANSCHELL
CBS BROADCASTING INC.
4024 Radford Avenue
Studio City, CA 91604

SUSANNA M. LOWY
CBS BROADCASTING INC.
51 West 52nd Street
New York, NY 10019

ROBERT CORN-REVERE
Counsel of Record
RONALD G. LONDON
AMBER L. HUSBANDS
DAVIS WRIGHT TREMAINE LLP
1919 Pennsylvania Ave., NW
Suite 200
Washington, D.C. 20006
(202) 973-4200

JEROME J. SHESTACK
WOLFBLOCK LLP
1650 Arch Street, 22nd Floor
Philadelphia, PA 19103
(215) 977-2000

Counsel for Respondents

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In the Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA, PETITIONERS

v.

CBS CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

GREGORY G. GARRE
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

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The court of appeals has set aside an order of the Federal Communications Commission (FCC or Commission) imposing a forfeiture on respondents for broadcasting the most widely viewed display of public indecency in television history. According to the court, the Commission acted arbitrarily and capriciously, in violation of the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, because the order represented an unacknowledged departure from a supposed policy of exempting all brief or fleeting material—including images—from enforcement of statutory and regulatory prohibitions on the broadcast of indecent material. No such policy existed, and the court's holding is inconsistent with settled principles of deference to an agency's reasonable interpretation of its own precedent.

In *FCC* v. *Fox Television Stations, Inc.*, No. 07-582 (argued Nov. 4, 2008), this Court is considering a related APA challenge to the FCC's enforcement of the federal broadcast-indecency prohibitions, which were upheld by the Court in *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978) (*Pacifica*). More specifically, both this case and *Fox* involve the Commission's treatment of indecent broadcast material that is isolated or fleeting. This Court's decision in *Fox* is likely to discuss the nature and scope of the Commission's prior indecency enforcement policy and the deference owed to the Commission's interpretation of its own policies and practices, and in doing so may inform the Court's assessment of the correctness of the court of appeals' reasoning in this case. The petition should therefore be held pending the decision in *Fox*. At that time, the Court can decide whether to grant certiorari, vacate the decision below, and remand the case for further consideration, or instead to grant certiorari and proceed with plenary review.

A. The Petition Should Be Held Pending This Court's Decision In *Fox* Because *Fox* May Lead The Court Of Appeals To Reconsider Its Analysis Of FCC Precedent

Contrary to respondents' assertion (Br. in Opp. 1) the government does not contend that "the legal question at issue here and in *Fox* is identical." Rather, as respondents correctly observe (*id.* at 11), "the question in *Fox* is whether the Commission's explanation of an *acknowledged* change in policy was sufficient, while the question here is whether the FCC changed its policy *at all* prior to the broadcast under review." In assessing the adequacy of the Commission's explanation for its change in policy in *Fox*, however, this Court will presumably consider what the change was. Doing so will

require the Court to compare the old indecency policy with the new indecency policy and consider the deference owed to the Commission's interpretation of its own policies and practices under administrative-law principles. That inquiry will shed light on the contours of the old policy and whether, in the context of this case, there was any change in policy at all. The prospect that the Court's decision in *Fox* will clarify the proper analysis here is a sufficient reason to hold the petition in this case, even though the two controversies do not present precisely the same legal issue.

The decision in *Fox* is particularly likely to be relevant to this case because the parties in *Fox* disagree about the nature of the FCC's old indecency policy. In *Fox*, the government has argued that the Commission's "general approach to indecency enforcement * * * stress[ed] the critical nature of context," Gov't Br. at 23, *Fox*, *supra* (No. 07-582), but that the FCC had applied an exception to that general rule in cases involving expletives, see *id.* at 17 ("[T]he Commission made one factor dispositive in its analysis in certain cases by holding that the utterance of a single vulgar expletive could not be found indecent, no matter how strongly other contextual factors weighed in favor of such a finding."). The respondents in *Fox* (including respondent CBS), by contrast, have argued that "there never has been an 'automatic exemption to the indecency prohibition for non-repeated expletives.'" NBC, CBS, and ABC Resp. Br. at 53 n.19, *Fox*, *supra* (No. 07-582) (citation omitted); see Fox Resp. Br. at 19, *Fox*, *supra* (No. 07-582) ("There was never a *per se* rule against liability for isolated expletives.").

Significantly, *neither* side's position in *Fox* is consistent with the view of the court of appeals in this case

that the FCC had "a consistent and entrenched policy of excluding fleeting broadcast material"—whether expletives, other kinds of words, or images—"from the scope of actionable indecency." Pet. App. 18a. And neither position is consistent with the view respondents now espouse (Br. in Opp. 2) that "[f]or almost 30 years the FCC held consistently that isolated, fleeting, or unintentional broadcasts of allegedly indecent material were not actionable."

Thus, regardless of the outcome in *Fox*, the Court's reasoning may lead the court of appeals in this case to reconsider its view that the Commission's order departed from a policy of exempting all fleeting material from indecency regulation or, at a minimum, shed light on the legal principles governing that determination. Because the decision in *Fox* ultimately may inform this Court's assessment of the correctness of the court of appeals' judgment in this case, the petition should be held pending the decision in *Fox* and disposed of as appropriate in light of that decision.

B. The Other Issues Identified By Respondents Are Not An Obstacle To Holding The Petition Pending The Decision In *Fox*

Respondents make little effort to argue that the petition should not be held pending the decision in *Fox*. Instead, they suggest (Br. in Opp. 12) that "the petition should be denied *especially if the issue presented is identical*" to that in *Fox*, since "[n]othing would be gained by granting the petition to consider the same question twice." While that observation is relevant to the decision whether to grant plenary review, it provides no basis for declining to hold the petition. In any event,

as explained above, although *Fox* is closely related to this case, the issues in the two cases are not identical.

Respondents are also wrong in contending (Br. in Opp. 12) that this Court's review would not "alter the practical outcome of the decision below." In respondents' view, the Commission would be unable to impose a forfeiture, even if the decision below were vacated, because the government "declined to seek review of another issue necessary to that goal—the requirement of showing scienter." *Ibid.* As noted in the petition (at 23 n.3), however, and as respondents appear to acknowledge (Br. in Opp. 9-10), the Third Circuit's discussion of scienter was dictum. See Pet. App. 81a (Rendell, J., dissenting). More importantly, respondents ignore the court's statement that "[r]ecklessness would appear to suffice as the appropriate scienter threshold for the broadcast indecency regime," *id.* at 74a; its observation that the Commission could meet that standard if it could show "that CBS acted recklessly and not merely negligently when it failed to implement a video delay mechanism for the Halftime Show broadcast," *id.* at 79a; and its suggestion that the Commission might reconsider the issue of scienter on remand, *id.* at 80a. Although the ultimate outcome of proceedings on remand would depend on the facts found by the Commission, the scienter requirement provides no reason to doubt that reconsideration of the APA issues by the court of appeals "may affect the outcome of the litigation." *Tyler* v. *Cain*, 533 U.S. 656, 666 n.6 (2001); see *Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996).

Respondents also argue (Br. in Opp. 11) that "[f]urther review" in this case "would be futile, because the Commission's appellate lawyers cannot now supply an explanation that the agency failed to give." But an "ex-

planation" is necessary only if the agency has changed its policy (if there is no change, there is nothing to explain), and the question on which the government has sought review is whether there was any change at all.

Finally, respondents contend (Br. in Opp. 22) that "the doctrine of constitutional avoidance" is a basis for denying review. A grant, vacatur, and remand to the court of appeals to reconsider its ruling on whether the FCC changed its enforcement policy, however, would not require this Court to consider any constitutional questions. Indeed, even if the Court were to grant plenary review, there would be no need for it to consider any constitutional issues. The court of appeals did not address any such issues, and there would be no occasion for this Court to consider them in the first instance. Instead, review could be confined to the non-constitutional questions decided by the court of appeals. See *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) (declining to reach issues that "were not addressed by the Court of Appeals," because "we are a court of review, not of first view"); see also Gov't Reply Br. at 15-18, *Fox*, *supra* (No. 07-582).

Contrary to respondents' suggestion (Br. in Opp. 23), there is in this case no "interrelationship between APA review and First Amendment analysis"—the two issues are analytically distinct. In particular, this case does not involve any disputed question of statutory interpretation that would make it appropriate to invoke the canon that *ambiguous* statutes should be construed so as to avoid serious doubt about their constitutionality. There is no dispute about the interpretation of 18 U.S.C. 1464, which prohibits the broadcast of indecency, and which the Commission has consistently interpreted to bar material—including nudity, such as the image at

issue here—that describes or depicts sexual or excretory organs or activities and that is patently offensive as measured by contemporary community standards for the broadcast medium. See *Pacifica*, 438 U.S. at 731-732. The only dispute concerns the validity of the FCC's enforcement policy under the APA.

C. The Decision Of The Court Of Appeals Is Erroneous

Respondents devote much of their brief to a defense of the court of appeals' merits analysis. That effort provides no basis for denying review. The purpose of holding the petition for *Fox* is to allow this Court to determine *after* that case is decided—and with the benefit of the Court's decision—whether the analysis in *Fox* casts doubt on the reasoning of the court below. In any event, respondents' arguments lack merit.

1. Like the court of appeals, respondents misinterpret the Commission's indecency enforcement framework, and their arguments fail to take account of the deference owed the Commission's reasonable interpretation of its own precedent. Respondents attribute (Br. in Opp. 17) dispositive significance to the observation that "[t]he Commission is unable to cite any case in which it actually explained that images were to be analyzed differently from words." As explained in the petition (at 18-19), however, the Commission has a general indecency framework that applies to both words and images. Under that framework, the Commission considers brevity, but only as one of three factors relevant to the assessment of patent offensiveness. *In re Industry Guidance on the Comm'n's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broad. Indecency*, 16 F.C.C.R. 7999, 8003 ¶ 10 (2001); see *id.* at 8002-8003 ¶ 9 (explaining that the determination whe-

ther a broadcast is "patently offensive" and therefore indecent turns on "the *full context*" in which the material is broadcast). For one subset of cases—those involving expletives—the Commission previously made the brevity factor dispositive. See Gov't Br. at 22-25, *Fox*, *supra*, (No. 07-582). Cases involving allegedly indecent material other than expletives, by contrast, were governed by the general three-factor test.

In contending that a series of orders from 1987 support their view that the prior indecency exception was not limited to expletives, respondents quote (Br. in Opp. 18) the Commission's order in *In re Infinity Broadcast Corp.*, 2 F.C.C.R. 2705 (1987), for the proposition that "deliberate and repetitive use in a patently offensive manner is a requisite to a finding of indecency." The quoted language, however, does not appear anywhere in that order. It does appear in *In re Pacifica Foundation, Inc.*, 2 F.C.C.R. 2698 (1987), but the context there belies respondents' interpretation. The full sentence reads as follows: "*If a complaint focuses solely on the use of expletives*, we believe that under the legal standards set forth in *Pacifica*, deliberate and repetitive use in a patently offensive manner is a requisite to a finding of indecency." *Id.* at 2699 ¶ 13 (emphasis added). Thus, far from announcing a rule applicable to indecency cases generally, the quoted language by its terms was limited to cases involving expletives.

2. Because respondents seek to invoke an exception to the Commission's general approach to indecency regulation, they have the burden of identifying some statement by the Commission that brief nudity is exempt from indecency regulation. Cf. *Commissioner* v. *Clark*, 489 U.S. 726, 739 (1989). Like the court of appeals, they have failed to do so—and no such statement exists. In-

stead, respondents rely (Br. in Opp. 16) on the Commission's order in *In re WGBH Educational Foundation*, 69 F.C.C.2d 1250 (1978), and on a set of unpublished staff letters denying various indecency complaints. But none of those decisions suggested that brief nudity was exempt from indecency regulation. In *WGBH*, the Commission rejected a petition to deny a license renewal, but it did not even discuss the petitioner's allegation that the licensee had broadcast nudity. *Id.* at 1254 ¶ 10 & n.6. And the staff orders respondents cite are similarly cryptic; they say nothing at all about the staff's analysis. Pet. App. 31a-32a.

3. Respondents' view of the regulatory history also fails to account for *In re Young Broadcasting of San Francisco, Inc.*, 19 F.C.C.R. 1751 (2004), issued just days before the 2004 Super Bowl, in which the Commission proposed to impose a forfeiture on a broadcast licensee for televising "less than a second" of nudity. *Id.* at 1755 ¶ 12. Respondents appear to recognize (Br. in Opp. 20) that the treatment of brief nudity in *Young Broadcasting* is inconsistent with the isolated-material exception that respondents believe the FCC formerly applied. Like the court of appeals, however, respondents cannot explain why the FCC, in a case like *Young Broadcasting*, would have abandoned without explanation its purported earlier policy of exempting brief or fleeting nudity from indecency sanctions. The more plausible conclusion is that the FCC in *Young Broadcasting* said nothing about a categorical exemption for brief nudity because no such exemption existed.

Respondents assert (Br. in Opp. 19) that the order in *Young Broadcasting* "does not constitute binding FCC precedent" because the Commission has not issued a forfeiture. *Young Broadcasting* is significant, however,

because it clearly reflects the Commission's understanding, at the time of the 2004 Super Bowl, that indecency sanctions could properly be based upon the broadcast of fleeting nudity. The fact that the Commission did not ultimately impose a monetary forfeiture in *Young Broadcasting* does not diminish the significance of the case as evidence of then-existing FCC policy.

4. Respondents contend (Br. in Opp. 14 n.7) that the decision below prevents the Commission from taking action only with respect to broadcasts that occurred before the FCC eliminated the isolated-expletive exception in *In re Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 19 F.C.C.R. 4975 (2004) (*Golden Globe Awards Order*). The court of appeals stated, however, that because the *Golden Globe Awards Order* addressed only expletives, "a residual policy on other categories of fleeting material—including all broadcast content other than expletives—remained in effect." Pet. App. 23a. Under the decision below, the Commission therefore may not take action against broadcasts involving brief images, no matter how sexually explicit or offensive those images may be, and no matter what time of day they are aired and how many children are in the viewing audience, until it formally changes the policy that the court of appeals (erroneously) concluded still exists. That result warrants review.

* * * * *

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be held pending this Court's decision in *FCC* v. *Fox Television Stations, Inc.*, No. 07-582, and then disposed of accordingly.

Respectfully submitted.

GREGORY G. GARRE
Solicitor General

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